

LAW FOR ENGINEERS
AND ARCHITECTS

SIMPSON AND DILLAVOU

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LAW FOR ENGINEERS AND ARCHITECTS

BY

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THIRD EDITION

BY

LAURENCE P. SIMPSON

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P R E F A C E

THE field of practice of engineering and architecture is no longer confined to designing and supervising the construction of works; engineers and architects have become counsellors and advisers in the investigation and promotion of enterprises, and the main reliance of the building owner for the knowledge he must have as to the requirements demanded by law relating to his project. It follows that the professional man, engaged in building and construction, is constantly being confronted with legal problems relating thereto. In increasing numbers universities and colleges are responding to this need by installing courses designed to teach certain of the legal principles applicable to the engineering profession. Since the time allotted to this study is in most cases relatively short, clearly such a course cannot enable one to become his own attorney; rather it should be designed to give such knowledge of the fundamental legal principles as will assist him in avoiding unpleasant and expensive pitfalls, and to aid him in protecting his employers, and his own rights and interests. Inevitably the practicing engineer or architect will acquire such knowledge, but usually it is only after long and costly experience.

It is believed that any engineering course normally should serve two major objectives: First, it should lay down the fundamental principles followed in the engineering profession; and, second, it should indicate by problems or illustrations the manner in which these principles are applied to concrete situations. Most of the textbooks covering the field of engineering and architectural law consist of a statement of abstract general principles. It is the purpose of the present volume (1) to state the fundamental principles of law in those branches which bear most directly upon the engineering profession; and (2) to illustrate these prin-

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ciples, wherever time and space permit, with cases where an engineer, architect, builder, or owner are involved as parties. Time does not permit all principles to be illustrated with cases; therefore it has been necessary to state many of them directly in text form.

In this, the third edition, the same method of combined text and case presentation has been followed as in the prior editions. It is believed that a bare textual statement of rules and principles, without factual situations showing their application, has little educational value in the field of law. In this latest edition upwards of 70 new cases have been added, most of which were decided after 1941. The amount of explanatory text has been materially increased. The order of subjects treated has been changed. The rules of law which govern a particular subject are stated at the beginning of each section, followed by amplifying and explanatory text material. Then follows such cases as are necessary to illustrate how the rules are applied to the actual fact situations. In a few instances hypothetical illustrations are used instead of cases in order to save space.

Greater emphasis has herein been given to the law of contracts than to any other branch, because of all subjects it is the most important and the most fundamental. Each of the requisite elements of a binding contract are considered in separate chapters—agreement, consideration, capacity, legality, reality of consent, and form. The formation of the contract being complete, its discharge by performance is next considered. Those factual situations which operate to excuse one of the parties from further obligation of performance are in turn examined. Important clauses from standard forms of construction contracts are printed at the head of cases in which their meaning and legal effects have been declared by the courts. Such matters as the duties of architects and engineers in giving certificates, the effect of arbitration clauses, of written orders, of clauses wherein time or quantities

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are made part of the contract, of the liability as a building owner for payment of subcontractors, and many related matters are separately dealt with. It is believed that engineers, architects, and contractors should know and understand the limits of their respective rights and obligations, as defined by these clauses in their contracts.

The law of Workmen's Compensation, Mechanic's Liens, and Rights in Land, being of special interest to the engineering and architectural professions, are considered separately, and their principles illustrated by cases. A list of standard forms of Construction Contracts, Invitations to Bidders, Subcontracts, Contracts between Architect and Owner, etc., have been included for purposes of reference and comparison.

LAURENCE P. SIMPSON.

New York University

July, 1946



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LAW FOR ENGINEERS AND ARCHITECTS

LAW IN GENERAL

SECTION 1.—THE NATURE OF LAW

Law, in the broadest sense of the word, means an established rule. So defined, it includes, not only the rules which govern human action, but also the course and sequence of events in nature. That an unsupported body falls we regard as the operation of the law of gravitation, meaning thereby that it is a safe prophecy that if the support is removed the body will fall. Similarly, as to human conduct; if it be in accordance with, or in transgression of, the established rule, the consequences may be predicted.

Law may be divided into:

(1) Natural law, meaning thereby the principles by which physical science explains sense phenomena; and

(2) The law of human conduct.

It is law as the body of rules governing human conduct, given as the command of the state in the administration of justice, called positive law, in which we are here interested. Thus we may at once separate from our inquiry all consideration of the moral law, or ethics, since the power of the state cannot be appealed to if it be disregarded. However strong the influence which the moral law exerted as a source of positive law, it is a matter entirely separate and apart.

Positive law has for its subject matter the definition and enforcement of rights and duties between men. The object of all

business transactions is the creation or change in the rights and duties of the parties. If you sell property or render services you expect to be paid. Without the sanction of law, without the remedy of enforcement which the law affords to compel payment, it is obvious that business could not operate.

Law is the body of rules under which the extremely complex industrial and commercial world of today functions. If a thing is done, if a transaction is entered into, it is essential that the parties be able to predict with certainty what their resultant rights and duties will be. Thus the creation and enforcement of rights, supplied by the law, is the essential concomitant of all business. Business might be regarded as a game conducted according to the rules of law. It is a fair inference that a participant in such a game, operating in ignorance of the rules, is at a disadvantage. While it is not true that everyone is deemed to know the law, it is true that the law says ignorance of the legal rule is no excuse.

SECTION 2.—SOURCES OF LAW

The sources of positive law in the United States are (1) legislative enactment and (2) judicial decision. Legislative enactment may take either of two forms, a constitution or a statute. Constitutions are fundamental and basic laws, by which the "sovereign," which in our form of government is the dominant element in the population, designates the organization of the government and defines and limits its powers and activities. By the device of making changes in constitutional legislation difficult, a greater degree of permanence is secured therein than exists as to statutory legislation. The Constitution is the supreme law of the land; and any statutory enactment in violation of its expressed principles and prohibitions is void.

Legislative enactment is often referred to as "written" law, in contradistinction to the "unwritten" law of judicial decision. This written law is to be found: (1) In the Constitution of the United States and in the Constitutions of the several states, which we have herein referred to as constitutional legislation;

and (2) in the acts of Congress and of the several state Legislatures and municipal legislative bodies, which we have called statutory legislation.

By far the greater part of the written law is to be found in the statutes, since they deal in detailed form with specific problems; while constitutions consist largely of general fundamental principles. Thus, from the prominence of the statutes, all of the written law is loosely spoken of as "statutory." Legislative enactment or "written law," being the directly expressed command of the state, supersedes and nullifies any rule already established by judicial decision which is in conflict with it. So the written law, whenever it invades territory already covered by the unwritten law, is supreme.

The other, and most intricate and far-reaching, source of positive law in the United States is the law formulated and promulgated by judicial decision, sometimes called the unwritten law, or the common law. Where a person sues another in the courts contending that his legal right has been infringed, the issue must be decided. Either he has a right or he has not. Whichever way the decision goes, it establishes a rule of law—a right, or no right, exists under such circumstances. At the present time, about twenty-five thousand cases each year are being decided in the courts in the United States.

Under the common-law system, when a court has once laid down a rule in deciding a case, that rule becomes binding precedent upon it, and upon all subordinate courts in the same jurisdiction, for the future. This is necessary for without it there would be no predictability in the law, and without it no one would know their rights.

This practice of the common-law courts of adherence to established precedent until repealed by legislation is known as the "doctrine of *stare decisis*."

Custom was the most important source of the common law. In order that custom be accorded recognition as law, it must have been in existence since time immemorial, or, as Blackstone put it, "so long that the memory of man runneth not to the contrary." At a very early time, beginning with the Year Books in 1272, the courts began to keep a record of their decisions; and upon new cases being presented it became the practice for the judges to search these records to see if the question before the court had

not already been decided, this being a procedure less difficult than an examination of what the custom actually was. So habitual has this practice become, and so vast the number of decisions recorded at the present time, that custom is almost never resorted to in the decision of a case, and lawyers have almost forgotten that they are the basis of the common law. Thus it is said that the common law is embodied in the cases.

In America the common law of England forms the basis of our jurisprudence in all states except Louisiana. As to all subjects not specifically covered by legislative enactment the common-law rule prevails.

"It is contended that the Code of 1881, which makes the common law of England the rule of decision in all courts of the state of Washington, is decisive as to the rule to be applied. We agree to this. But we do not subscribe to the next proposition, that resort can be had only to the decisions of English courts, or to those of American courts which have followed them, to ascertain what the common law of England is or was, unless the English decisions commend themselves to reason, or have been so long and generally followed that to depart from them would tend to unsettle what has, by 'immemorial and universal usage,' been understood to be settled. The common law grew with society, not ahead of it. As society became more complex, and new demands were made upon the law by reason of new circumstances, the courts originally, in England, out of the storehouse of reason and good sense, declared the 'common law.' But since courts have had an existence in America they have never hesitated to take upon themselves the responsibility of saying what *is* the common law, notwithstanding current English decisions, especially upon questions involving new conditions. Therefore we have the 'common law' as declared by the highest courts of this, that, and the other state, and by the courts of the United States, sometimes varying in each. And we understand the function of this court to be to endeavor to administer justice according to the promptings of reason and common sense, which are the cardinal principles of the common law, but not that the decisions of English courts are to be taken blindly and without inquiry as to their reasoning or application to the circumstances."¹

¹ Stiles, J., in *Sayward v. Carlson*,

¹ Wash. 29, at page 40, 23 P. 830, 833
(1896).

Thus the common law of Illinois may differ from the common law of New York or of England. It is the body of case law formulated by Illinois courts since their inception; founded upon the English common law, but amplified from it. We may properly speak of the common law of any particular jurisdiction, but the common law as a general body of legal principle is so vague a concept that Justice Holmes has ironically called it "the brooding omnipresence in the sky." Common law is case law, judge-made law, law formulated by judicial decision.

SECTION 3.—DEVELOPMENT OF LAW

Since the common law of England, as developed to the colonial period, has been adopted as the basis of American jurisprudence, the history of American law is largely the history of English law. Any adequate conception of our existing legal institutions, such as equity jurisprudence, for example, depends upon an examination of the origin and growth of the law of England.

To-day the legal relations of the whole civilized world are governed by two distinct systems of law, the Roman or civil law, and the common law of England. The growth of the Roman law began with the first uprearing of the Roman state, with the first authentic legal records, the Twelve Tables, established 450 B. C. The *Institutes* of Gaius, Theodosius, and Justinian, most particularly the latter, molded the unwritten law of Rome into a code so systematic and perfect that after fourteen centuries it is still operative as the basic law of all European countries, except Great Britain. For in the Middle Ages the newly risen national states of continental Europe adopted as their heritage from the fall of the world empire the civil law of Rome.

Curiously enough, considering the six centuries of Roman occupation of the British Isles, England, of all the European nations, was the only country to develop an independent system of unwritten law. Superimposed upon the Codes of Alfred and Canute and the West Saxon laws came the arbitrary rule of the great court of the Norman conquerors, the Curia Regis, which

held its sway for two centuries. With the Magna Charta, in 1215, and the establishment of the Courts of Common Pleas, King's Bench, and Exchequer in place of the Curia Regis, and the formulation by King Edward I of a uniform, though rudimentary, legal system from the Mercian, West Saxon, and Danish laws, came the real beginning of the "common" law of England, so called because it provided rules uniform or common to all parts of the land. Since the thirteenth century the common law has grown and developed into the magnificent structure of logical principle which it is to-day.

GROWTH OF EQUITY JURISPRUDENCE.—One of the most important developments in the formation of English law was the introduction of the principles of equity. The early common-law courts were limited very strictly as to the jurisdiction which they could or would exercise. Only a few forms of action, or writs, had been invented; and unless a wrong could be brought within the rigid confines of an existing writ the courts refused any relief. If there were no remedy, there was no right. One of the doctrines asserted by William the Conqueror and his successors, the absoluteness of whose power was unquestioned, was that the sovereign was the lawgiver, and therefore above the law, the fountain of all justice. Consequently the king frequently dispensed justice, irrespective of the law courts. If for some serious wrong the law afforded no remedy, the aggrieved party might present his case to the king for relief. The limited jurisdiction of the common-law courts, the rigid character of whose remedial writs increased as the judges came to rely more and more on precedent in interpreting their scope, made great increase in the practice of petitioning the king for relief. These petitions became so numerous that they came to be handled by the king's Chancellor, and later by the Court of Chancery, over which the Chancellor presided. Such was the origin of England's first Chancery Court, or Court of Equity.

At first the king's justice was dispensed with little regard to the status of the petitioner before the law courts, it being entirely presumptuous to question the king's right to interfere with the law, since he was superior to it; but as the Court of Chancery assumed an identity of its own, distinct from the idea of its being the king's representative as the fountain of justice, limita-

tion of its jurisdiction became more practicable. The rule came to be generally recognized that the Court of Chancery could only be resorted to where there was no remedy afforded by the law courts; and that is the rule to-day.

The Chancellor, in rendering his judgments, was at first bound by no rules except such as good conscience and reason dictated, deciding each case according to his own idea of the abstract principles of justice. The decisions were reported, however, and the successive Chancellors felt themselves bound by the precedent of the court's prior decisions. Thus there grew up an extensive body of equity law, supplementary to the body of legal rules formulated by the law courts.

Equity and law today are administered in most states by the same court, the total of rules formulated thereby comprising the common law. Whether a plaintiff is entitled to an equitable remedy depends upon the nature of his case. Wherever the normal legal remedy of money damages affords him adequate relief, his suit must be at law. Wherever the legal remedy is inadequate, he has a right in equity.

There is here no space for explanation of the scope of equity jurisprudence, but we may state some of the general principles or maxims:

(1) *Equity will not suffer a wrong to be without a remedy.* This is the most fundamental maxim, for it states the basic idea of the whole system. Equity came into being because of the inadequacy of law to administer complete justice. Where the inflexibility of legal remedy does not afford justice, equity steps in.

(2) *Equity acts in personam.* Here is a most important feature distinguishing equitable from legal relief. The negative nature of law does not permit direct command to the parties. Law acts only against their property, the only command being to the sheriff to seize and sell enough of the defendant's goods and turn over to the plaintiff sufficient of the proceeds to satisfy the money judgment of the court. Equity, on the other hand, has power to act against the person of the defendant, commanding him directly to do or to refrain from doing the particular acts which are the subject of the decree.

(3) *Equity regards that as done which ought to be done.* Thus, if a contract is broken, law may only render a money judg-

ment for damages; but equity will order that the contract be specifically performed.

(4) *He who seeks equity must do equity.*

(5) *He who comes into equity must do so with clean hands.*

(6) *Equality is equity.*

The system of equity jurisprudence in its character as a supplementary portion of the common law was brought with it to America and established as an integral part of our law. Separate chancery courts exist in a few states,² but for the most part the same court sits now as a court of law, dispensing strictly legal relief, and now as a court of chancery, administering equity principles to cases for which the law affords no remedy.

The unwritten law of America, therefore, has its origin in the common law of England. Most of the states have by legislative enactment, either constitutional or statutory, declared the English common-law system the basis of judicial decision in all cases where it has not been superseded by statutory or written law. Each jurisdiction has taken as the basis of its law the common law of England in its form as it existed at the time of the Revolution, and has developed it along the lines which to each seemed most in accord with justice and reason. Thus to-day we have the common law of Illinois and the common law of New York, for example; and their common source is their true identity.

SECTION 4.—LEGAL RIGHTS AND DUTIES

The purpose of law is the promotion of the general good in the regulation of human conduct. The means which the law takes to secure this end is the definition of rights and duties existing between individuals. So legal relations form the subject-matter of law. Rights and duties are the most important of legal relations.

² Alabama, Delaware, Maryland, Mississippi, New Jersey, and Tennessee.

A legal right is a power, privilege, or interest recognized and protected by law. The obligation which the law imposes upon others to refrain from violation of a right is a legal duty. Thus, duty is a correlative of right. For example, where A and B have entered into a contract, we may express their legal relations either: A has a right that B shall perform; or B owes A a duty to perform. In other words, if a person possesses a legal right, there exists some other person or persons who are under a legal duty to observe that right.

Rights are of two kinds, namely:

(1) *Primary rights*, or those which exist independent of any individual action, attached to the person solely by virtue of the fact that he is a person and a member of the social order. These primary rights the possessor holds against the whole community; and the whole community—that is, all other individuals—owe a corresponding duty to refrain from the violation of them. For example, a person has the right to be secure in his person and property; and every other person owes him a duty to refrain from any violation thereof.

Such rights do not come into being by virtue of any act of the parties; they exist coincidentally with ownership of person and property, and are the kind of rights termed by eighteenth century legal theorists "natural rights." These rights are often called "rights in rem" and "rights of ownership." Violations of primary rights are either civil wrongs, torts, or crimes; the latter depending upon whether the statutory law has so declared. Libel, slander, assault, trespass, negligence, and the like, are torts.

(2) *Secondary rights* are those which come into being as the result of individual action, and which exist, not against other persons generally, but only against a particular person or persons. All rights arising out of contract are examples. Suppose A and B contract with each other. Before this act, their legal relation, or the sum total of rights and duties each owed the other, was fixed. Now, by virtue of their action, their legal relations are changed; the sum total of rights which A previously had against B is now increased by a new right, the right that B perform the contractual agreement. This new right is different in kind from the primary rights, first because it did not exist as necessarily incident to A's person, but came into being by B's act;

and, second, it is a right, not against other persons generally, but against B alone.

Another form of rights exists, often called *remedial rights*. Such rights accrue upon the violation of the legal rights mentioned above; that is, they arise in favor of a party injured against the doer of a legal wrong. They amount to a right of reparation, usually money damages. All that is meant by saying that a person has a right of this kind is that, if he applies to the courts, the probability is that the wrong will be redressed. In this sense, as Justice Holmes has observed, a right is something in the nature of a prophecy.

It must be remembered that, although most of the language used in discussing rights and duties talks of them as things or objects, this is no more than by way of figure of speech. This hypostatizing or "thingifying" of an abstraction often leads to misconception of the actual nature of rights. It should be borne in mind that, when we talk of rights and duties, we are speaking of *relations*, not objects.

SECTION 5.—LEGAL PROCEDURE

1. *Service of summons*.—The decisions of the courts incorporated in the reports form the original sources of legal study; and a proper comprehension of these decisions requires some understanding of the procedure used. At law, the party who starts the suit is called the plaintiff; in equity, he is called the complainant. The party sued is in either case known as the defendant. The first step is to secure jurisdiction of the court over the person of the defendant. This is done by serving him personally with what is known as a summons, the purpose of which is to give actual and written notice that legal action has been instituted against him. Service of summons is very essential, since the court is powerless to render a binding judgment against any defendant not so notified, for every man is entitled to his "day in court"; that is, he is entitled to a chance to appear and interpose any defense which he may have.

2. *Complaint and answer.*—The next step in the suit is the filing of a document variously called a declaration, a petition, a bill, or a statement of claim. This consists of a statement of the facts which led to the present controversy, which facts the plaintiff expects to prove to the court, in order that he may sustain his cause of action. By way of a counterpleading, the defendant then files with the court a written statement of his side of the dispute. His defense may be of several kinds: First, it may be a demurrer, which in substance states that, admitting all the plaintiff says in his declaration to be true, still as a matter of law such facts do not entitle him to recover. A second kind of defense consists of a denial by the defendant of the facts stated in the plaintiff's declaration. This pleading is called an answer or a plea. Or the defendant may admit the facts, but state additional facts in avoidance or excuse of the facts plaintiff alleges. In such case the pleadings continue until one side denies the facts alleged by the other. This raises an issue for decision, and the case is ready to go to trial.

3. *Jury trial.*—In any suit at law, either side is entitled to a trial by jury, if he so desires. The province of the jury is to decide all questions of fact. It is for the judge to decide questions of law. The first step in a jury trial is the impaneling of the jury. This consists of questioning the individual jurors as to whether any of them have any prejudices for or against either side. Following the selection of the jury, counsel may make an opening statement, each side explaining briefly what they expect to prove in the trial. Then follows the introduction of the evidence. After all the evidence is in on both sides, the judge issues instructions to the jury as to the law relating to the issues raised, and the jury retires for deliberation on their verdict.

4. *Motion for new trial.*—After the verdict is rendered, and before the court pronounces judgment, the losing party may make a formal motion for a new trial. If during the course of the proceedings the judge made an erroneous ruling admitting or rejecting evidence, or gave an erroneous instruction to the jury, or refused to give a correct instruction, or if the verdict is against the manifest weight of the evidence, upon this motion the court may arrest the judgment and order a new trial. In the event that the court refuses to grant a new trial, judgment is entered upon the verdict, and the losing party may then take the case on ap-

peal to a court of review, if he is still of the opinion that there was substantial error in the conduct of the trial.

5. *Judgment.*—If the case is at law and the verdict is rendered for the plaintiff, the judgment can only be for money damages. A judgment at law is only a judicial finding that the defendant owes to the plaintiff a stated sum of money. There is no order to the defendant to pay the plaintiff. After judgment, at the instance of the plaintiff, the court will issue a formal document called an execution directed to the sheriff commanding such officer to serve the document upon the judgment debtor and to demand payment of the debt. The power of the sheriff to seize and sell property of the judgment debtor to satisfy the debt has its source in the writ of execution, though usually another writ called a levy is necessary. By the levy the sheriff is ordered to seize and sell to the highest bidder at public sale the property of the debtor specified in the writ.

A judgment for the plaintiff in equity is called a decree. It is a command or order by the court to the defendant to do or refrain from doing some stated act. The command may be to pay the plaintiff a stated sum of money, as an alimony decree or an order to the defendant to convey to the plaintiff a stated plot of land, or an order to the defendant to cease trespassing upon plaintiff's property. If the defendant fails to obey the decree he may be committed to jail for contempt of court.

6. *Appeal.*—The trial must result in a decision either for the plaintiff or for the defendant. After the judgment or decree, as the case may be, is entered, either party if dissatisfied with the result may take an appeal if he thinks there was error of law upon the trial. The one who takes the case up on appeal is called the appellant; the other side is called the appellee. On an appeal no new trial is had before the court of review. That court considers simply the record of the proceedings had before the trial court, and the exceptions taken to the alleged erroneous rulings of the trial judge on such matters as process, pleading, admission of evidence, instructions, etc., given during the trial of the case. If substantial error was committed, prejudicial to the losing side, the judgment of the lower court is reversed and the case remanded for a new trial.

It should be understood that an appeal from a judgment of the trial court can only be upon a question of law, never on a question of fact. The facts as found by the jury on the trial are conclusive; no appellate court has any power to say that the jury was wrong. As a simple example, take a criminal trial. Defendant is indicted for robbery and at the trial the jury finds on the evidence that defendant with intent and force took the money from the complaining witness, disbelieving the defendant's testimony that the package of currency was thrust upon him by a fleeing stranger and thus innocently in his possession upon his arrest. An appeal from a conviction could not possibly involve a finding by the court of appeals that the jury was wrong, and that defendant was in innocent possession of the money. The only issue on appeal from a judgment is whether the trial court incorrectly applied the law to the facts, either in instructing the jury as to the law, or ruling upon the admission or exclusion of evidence, etc.

7. *Evidence.*—Only testimony which is relevant to the issues framed by the complaint and answer is admissible in evidence. For example, suppose the suit is for the price of goods sold and the defendant has pleaded payment as the sole defense. If on the witness stand defendant attempts to testify that the goods delivered were not in accordance with the contract, the plaintiff's objection to the testimony would be sustained as irrelevant and immaterial, since the sole issue before the court is whether the goods had been paid for or not.

The best evidence rule, as the name indicates, renders inadmissible secondary evidence to prove a fact unless the best evidence cannot be produced either because it is no longer in existence or because it is for some other reason unavoidable. In a suit on a written contract, for example, the best evidence would be the contract itself, so oral testimony of the plaintiff as to the contents of the writing would not be admitted in evidence until it first made to appear that the written contract is lost or no longer in existence.

The hearsay rule forbids a witness to testify as to what he has heard others say as to facts at issue in the trial. A person may testify only as to what he himself has actually seen and experienced.

The parol evidence rule forbids introduction of oral testimony to change or vary the effect of a written instrument. If the written contract calls for sale and delivery of 5000 tons of steel rods, in a suit for breach the defendant will not be permitted to testify that his real agreement was to deliver only 200 tons.

8. *Garnishment and attachment.*—A judgment creditor may not be able to discover any tangible property belonging to the debtor upon which he can levy to satisfy his judgment. But suppose he discovers that a third party owes the judgment debtor a sum of money already due. An example would be money of the debtor on deposit in a bank. In such case the judgment creditor may "garnishee" the bank, i. e. start a garnishment suit against the bank to result in a judgment requiring the bank to pay over to the plaintiff so much of the deposit as will satisfy the original judgment debt.

Garnishment proceedings are commonly resorted to in connection with collection of unpaid judgments against employees of third persons, although these proceedings are not restricted to such cases and may be employed to collect a judgment in any case where the judgment debtor is in any way a creditor of a third person.

A writ of attachment is one under which property of a defendant in a pending action is seized before judgment, for the purpose of securing the plaintiff in his right to enforce his judgment on execution. Suppose there is danger that a defendant conceal or dispose of his tangible property before judgment so as to render the judgment uncollectible. If the property is subjected to seizure by an attachment writ, plaintiff will be able to collect his judgment after he obtains it.

9. *Specific performance.*—Where the ordinary remedy at law of a judgment for damages is an inadequate remedy, action on the contract may be brought in equity and a decree commanding the defendant to perform the contract will be rendered. Usually a judgment for money damages will put the aggrieved party in as good a position as though the contract had been performed. Suppose D has contracted to sell and deliver to P 1,000 bushels of wheat at a dollar a bushel; the market price has gone to \$1.10 per bushel and D refuses to deliver. At law P gets a judgment for \$100 damages which is the extent to which he was injured by

D's breach. But suppose the subject matter of the contract is a rare painting, or stock in a close corporation none of which is available upon the market. Obviously here in case the seller breaches the contract money damages would be an inadequate remedy. Equity will take jurisdiction and decree that the seller specifically perform the contract. Also all contracts for the sale of land, if breached either by buyer or seller, equity will decree specific performance.

10. *Injunction*.—An injunction, like a decree for specific performance, issues out of equity. The injunction is ordinarily used to command a defendant to cease the commission of a continuing wrong such as trespassing upon plaintiff's property, committing a nuisance, interfering with plaintiff's business, or continuing a wrong in labor disputes. In a number of instances, however, it is used to prevent a threatened breach of contract. A contract for unique services, for example, as where a famous opera singer is under contract to sing under A's management alone is capable of enforcement by enjoining the singer from singing from under the management of anyone else. Or where in connection with the sale of his business to C, D contracts not to go into a similar business in the same community for a stated number of years, and in breach D is about to open a similar competing business, C may get an injunction to restrain D from doing so.

11. *Bankruptcy*.—A person is insolvent when his debts exceed his assets. To enable such a person to get a new start, and also to ensure equal protection of his creditor in the payment of their claims, a proceeding in bankruptcy is possible, in the course of which the available assets of the debtor are turned into cash, the creditors are ratably paid, and the bankrupt receives a discharge from his debts. A "voluntary" petition in bankruptcy is one initiated by the debtor. An "involuntary" petition is one filed by his creditors in the minimum number of three. In either case, an inventory of all the debtor's property is taken, and a receiver is appointed to take charge of such assets. No creditor can thereafter seize any asset of the debtor to discharge his claim. He must file his claim in the bankruptcy proceeding and receive his proportional dividend along with the other creditors.

12. *Receiverships*.—A receiver is a person appointed by the court to take charge of and conserve property that has come under the control of the court in the course of litigation. Where a

mortgage is being foreclosed, the court may appoint a receiver to collect the rents and manage the property pending the decree. The balance of rents above costs of management would then be applied to reduce the mortgage debt. Receiverships are used in suits by beneficiaries against a trustee, by creditors against corporations, in connection with decedents' estates, in bankruptcy, etc. Mainly, receiverships are collateral remedies of creditors.

13. *How to find the law.*—As we have seen above, the law governing a controversy is either contained in a statute or in the printed decisions of the courts in which similar controversies in the past were decided. The rule will be either statutory or common law. Since a statutory rule supersedes the common law rule, the first place to look is in the bound volume containing the state statutes. If the point is not there covered, it is necessary to go to the cases.

The decisions of the courts of review of each state and of the United States are handed down in the form of written opinions. These decisions are collected and printed in book form, and are called reports. A written decision contains a statement of the facts involved in the controversy, the question of law presented, the court's holding on the question, and the reasoning upon which the holding is supported. If the court can find in the reports of its previous cases a former decision in which the identical question has been decided, the precedent there established will ordinarily be deemed conclusive in disposing of the present case. If there is no such decision, then the search is for some case closely analogous in facts and issues. However, if the case at bar presents a question entirely new, it is the function of the court to decide the controversy, and thereby establish a new rule of law, upon the basis of justice and reason; that is, according to the standard of the economic and sociological interests and needs to be affected thereby, not upon any application of the principles of logic, for in the decision of a question by hypothesis "new" the principles of logic are inadequate.

The decisions of the highest courts in every state and territory are printed and collected in a series of volumes called "reports." These reports are numbered consecutively and chronologically, so that a Missouri case decided in the year 1894, for example, will be found in the 122d volume of the Missouri reports. It will be re-

fferred to by name, and for the sake of brevity as 122 Mo. at page 61.

In addition to the separate state reports, the cases decided by the highest courts of all of the states are also printed by the publisher of this book in a series called the National Reporter System. Thus, the states in a particular section of the country are grouped together and the decisions of their courts are printed in this series. These reports are called: North Eastern, Atlantic, North Western, Southern, South Eastern, South Western, and Pacific. Therefore, any particular case may be found in the state reports of the state where it was decided, and it may also be found in the National Reporter System. Consequently any case will have two equivalent citations. To take the above example, the first case in this book is to be found in the 122d volume of the Missouri state reports, at page 61, and also in the 27th volume of the South Western Reporter, at page 610. The correct citation, then, is 122 Mo. 61, 27 S.W. 610.

S. & D., ENG. & ARCH. 3RD ED.—2



CONTRACTS

Chapter

1. Offer and Acceptance.
 2. Consideration.
 3. Capacity of Parties.
 4. Legality.
 5. Reality of Consent.
 6. Contracts Required to be In Writing.
 7. Performance of Contracts.
 8. Assignment of Contracts.
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CHAPTER 1

OFFER AND ACCEPTANCE

Section

1. In General.
 2. Requisites of an Offer.
 3. Duration of Offers.
 4. Requisites of an Acceptance.
 5. Implied Contracts.
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SECTION 1.—IN GENERAL

A contract is an agreement, enforceable at law, made between two or more parties, consisting of a promise to act on one side made in exchange for an act or promise to act on the part of the other.

Two central ideas are involved in contract: (1) Agreement, or the operative facts in the case; and (2) obligation, or the legal effect of these facts. In the first chapter we shall consider what facts are necessary to constitute an agreement; and in the chapters following we shall take up the question of what agreements the law will enforce.

Contracts are either express or implied, oral or written, formal or informal, executed or executory, unilateral or bilateral.

An express contract is one in which the promises of the parties are expressed in words. An implied contract is one where from

the conduct of the parties the mutual promises are implied. Thus the mere presence of a street car operating on the street is an implied offer of carriage, accepted by the passenger when he boards the car. The act of shipping goods in response to an order implies a promise or contract to pass title to the goods. Consulting a doctor or dentist implies a promise to pay the reasonable price of a visit though fees are not mentioned.

Oral contracts are as valid as written contracts, except in the few instances in which by statute a writing is required, discussed herein in Chapter 6. The advantage of a written contract is the ease and certainty of proving it and the avoidance of misunderstandings as to the terms thus preventing possible subsequent litigation.

A formal contract is a contract under seal. Of course, in order that a seal be attached to a signature the contract would have to be in writing; but it is not the fact of the writing that classifies the contract as formal. The legal effect of the seal is discussed in Chapter 2 on Consideration.

An executed contract is one in which the promise or promises have been performed. Where there are mutual promises, as where A promises to sell and deliver a car to B in exchange for B's promise to pay A \$500, the contract may be partly executed and partly executory, as where A has delivered but B has not yet paid. If neither party has as yet performed the contract is said to be wholly executory.

A bilateral contract is a promise for a promise. For example, if A says, "I will give you \$100 if you will agree to plow this field", and B replied, "All right, I agree to plow it for \$100," we have here a contract bilateral in its nature; for obligations are created on both sides growing out of the mutual promises.

But also there are some contracts which consist, not of a promise for a promise, but of a promise for an act. In such case the contract is said to be *unilateral*. For example, if in response to A's offer to pay \$100 for the plowing of the field B fails to obligate himself by any promise, but simply goes ahead and plows the field, a contract comes into existence upon the completion of the act for which the promise was given. Note that an offer never becomes a promise until it is accepted, either by the reciprocal promise of the other party, or by the doing of the act in exchange for which it was made.

Herein lies the importance of distinguishing between unilateral and bilateral offers. Any offer may be revoked up to the time of acceptance. Since acceptance of a unilateral offer can be made only by completion of the act called for, and since completion of the act ordinarily requires time, it follows that the offeree may be notified of revocation after he has entered upon performance and even after he has nearly completed. He has then no contract claim against the offeror, for no contract has been entered into. Hence it is always better for the offeree to enter into an actual present agreement for future performance, rather than to rely upon the continuing assent of the offeror. True, this binds the offeree to performance, but that is the price of binding the offeror. Unless both parties are bound, neither is bound.

THE OBLIGATION.—Obligation flows from the promises of the parties. Any promise which the law will enforce creates in the promisor a legal duty of performance. This duty is owed to the person to whom the promise is made, the promisee. By virtue of the legal duty or obligation assumed by the promisor a correlative right is created in the promisee that the promisor will perform his promise. In any bilateral contract these rights and duties are reciprocal.

“Agreement” is a broader term than “contract,” since only the particular kind of agreements which the law will enforce will operate to create contractual legal relations. In other words, only promises *enforceable at law* operate to create legal rights and duties. The requisites of a binding contract are as follows:

(1) **Agreement;** consisting of mutual promises wherein the minds of the parties meet in a single intention.

(2) **Consideration;** upon which the mutual promises may be supported.

(3) **Capacity of parties;** that is, the parties must be capable in law of making a contract binding upon them.

(4) **Reality of consent;** the intention must be voluntary or no true agreement can result.

(5) **Legality;** the object of the contract must not be illegal.

(6) **Formal requisites;** the contract must be in the form required by law.

All of these requisites must be present to make a binding contract. We shall proceed to take up in turn each of these elements in separate chapters.

THE AGREEMENT.—An agreement is the expression by two or more persons, either by words or by conduct, of a common intention to affect the legal relations of those persons. There must be an expression of assent in one and the same intention.¹ Since there must be an expression of assent, there must be communication between both parties of the intention to agree. A secret acceptance of a proposal cannot constitute agreement; nor can an acceptance be made by a party who is ignorant of the proposal. This may be illustrated by a situation where one sends an offer to another to sell him certain goods. It happens that the party to whom the offer is made has already sent an order for the exact goods. In spite of the fact that offer and acceptance are identical in terms, no contract arises from this accidental exchange of letters. The letter containing the order was mailed before the sender had knowledge of the offer. Here are two offers, but no contract, because no agreement.

The matter of acceptance of the offer of a reward is also worked out by the same principle. If a person finds a watch or captures a criminal in ignorance of the fact that a reward has been offered therefor, he cannot claim the reward when later he learns of it, for the contract lacks the element of agreement. In the case of rewards offered by a government, some courts permit a recovery without communication of the offer, on the ground that the offer is in the nature of a bounty rather than contract.²

An agreement necessarily involves at least two parties; a man cannot make an agreement with himself, for such agreement cannot operate to affect legal relations.

Although an agreement, when consummated, consists of a promise, or mutual promises, it arises from an offer made by one party to another, and an acceptance of the offer by the latter, with the result that both are bound. Offer and acceptance, then, are the operative facts from which an agreement is created. We shall consider them in detail.

¹ Clark, Contracts, 2d Ed., 2.

² *Choice v. City of Dallas, Tex.Civ. App.*, 210 S.W. 753 (1919).

SECTION 2.—REQUISITES OF AN OFFER

An offer is a communication to the offeree of the offeror's intention to do an act in the future, provided that the offeree will likewise perform some act. The requisites are:

- (1) The offer must evidence a serious contractual intent;
- (2) The offer must be communicated to the offeree;
- (3) The offer must in terms be definite and certain.

The offer may in form be (1) of a promise for a promise; (2) of a promise for an act; or (3) of an act for a promise. For example, if A says to B, "I will pay to you \$100 if you will agree to plow this field," here is an offer of a promise for a promise. But if A says, "I will pay you \$100 to plow this field," the offer is of a promise for an act. Suppose the proposal comes from B as follows: "I will plow your field if you will agree to pay me \$100." The offer is here of an act for a promise. The presence of a street car or bus on the street is a constant offer to the public of the act of carriage for a promise of payment of the fare.

An offer remains an offer as long as it is in existence, until it is accepted by the person to whom it is made. While still an offer, there is no obligation upon the offeror to perform the act which he has proposed to perform. But, upon acceptance, that which was an offer now becomes a promise, creating a legal duty in the offeror to perform. The offer to perform disappears; the duty to perform arises.

There are three essential elements which must be present in any offer in order that it be "binding," in the sense that it may be turned into a contractual promise by acceptance. It is necessary to consider each of the three in detail.

THE OFFER MUST INTEND A CONTRACTUAL RELATION. The first requisite of a binding offer is that it clearly evidence a definite contractual intention. Advertisements, circular letters quoting prices, and merchants' announcements are often mistaken as offers. These are mere invitations to trade. Thus a printed letter sent out by Montgomery Ward & Co. to the effect that, "We enclose a printed document setting forth the terms up-

on which Iver Johnson revolvers will be sold to the jobbing trade," was interpreted by one Johnson as an offer. He sent an order for the goods within the terms mentioned, and claimed his order constituted an acceptance of the offer. It was held that the letter constituted a mere invitation for bids, and that Johnson's order was itself an offer of which there had been no acceptance by Montgomery Ward.³

Since agreement consists of a common intention to affect legal relations, directly contemplating the creation of rights and duties, the element of contractual intent must be apparent in the offer. For this reason a proposal obviously made in jest is not an offer capable of being made the basis of contractual relations. Serious contractual intent is a necessary element of an offer. However, it is to be noted that, if from the offeror's words and acts one might *reasonably believe* that he was in earnest in his offer, it will be sufficient, whatever his secret intent. The law does not deal with the secret intentions of the parties, but only with intent as outwardly manifested. Apparent intent is sufficient. Thus, where a man offered a seventeen year old girl a thousand dollars if she would continue to keep house for him for another five years, the court held that the offer was valid, notwithstanding the fact that it was not seriously made. "If one addresses to another what appears to be the offer of a contract, and that other accepts, believing that such an offer was really meant, the party offering cannot avoid liability by saying that he did not mean what his words fairly implied."⁴

³ *Montgomery Ward & Co. v. Johnson*, 209 Mass. 89, 95 N.E. 290 (1911).

⁴ *Plate v. Durst*, 42 W.Va. 63, 24 S.E. 580, 32 L.R.A. 404 (1896).

In *Higgins v. Lessig*, 49 Ill.App. 459, defendant's harness, worth about \$15, had been stolen, and in a state of excitement defendant said: "I will give \$100 to any man who will find out who the thief is, and I will give \$100 to any lawyer who will prosecute him." Plaintiff found the thief and sued for the reward. In holding that no contract resulted, the court said: "We do not think that the language used was such as, under the

circumstances, would show an intention to contract to pay a reward, and think plaintiff had no right to regard it as such. His language was in the nature of an explosion of wrath against some thief who had stolen the harness, and was coupled with boasting and bluster about the prosecution of the thief. It was indicative of a state of excitement so out of proportion to the supposed cause of it, that it should be regarded rather as an extravagant exclamation of an excited man than as manifesting an intention to contract."

Also the words used in making the offer must be such as clearly evidence contractual intent. In the following cases, this and other requisites of contractual intent are illustrated.

THE OFFER MUST BE COMMUNICATED TO THE OFFEREE. An offer is made only at the moment it is communicated to the offeree. Until this has been done, clearly no contract can result, since there can be no expression of assent with intent to affect legal relations.

THE OFFER MUST BE DEFINITE AND CERTAIN. Since an agreement, to be "enforceable at law," must be such as the courts can enforce, it necessarily follows that the first step therein, the offer, must be sufficiently definite and certain as to enable the court to gather what the intention of the parties was and carry that intention into effect. Thus, an offer to sell an acre of land, no particular acre being mentioned, could not be a binding offer, it lacking certainty as to the identity of the subject-matter. In general, it may be said that an offer must be definite as to its terms, price, quantity, and subject-matter. This rule is, however, subject to the limitation that in some cases a missing term may be supplied by implication. Thus, an offer to sell goods, such as cotton, corn, steel, etc., need not name the price, for in the absence thereof the market or reasonable price will be deemed an implied term of the offer. So, also, an offer to sell goods need not necessarily specify the quantity, it being held that any amount up to a reasonable maximum is an implied term of such an offer.⁵

If an offer is so indefinite, or so incomplete, that the accepting party must introduce terms, or add terms, we have a case where the original intended offer merely led to a more complete proposal on the part of the offeree, which now stands as the offer and must be accepted by the first party before a contract will arise.

As stated, the offer must be sufficiently definite so that the courts can enforce it. For example: A offers to sell B an acre of land, a lot in Los Angeles, or to give B "a fair share of the yearly

⁵ T. F. Seymour v. Armstrong & Kasselbaum, 62 Kan. 720, 64 P. 612 (1901).

profits of a business, if B will continue in his employ.”⁶ None of these are sufficiently certain in terms to result in a contract. As to the last example, the court said: “A fair share of the defendant’s profits may be any amount from a nominal sum to a material part according to the particular views of the person whose guess is considered. Such an executory contract must rest upon the honor and good faith of the parties. The courts cannot aid parties when they are unable or unwilling to agree upon the terms of their own proposed contract.”

In the cases following, these principles determinative of whether acceptance of offers lacking essential requisites result in binding contracts are applied.

ANDERSON et al. v. BOARD, ETC., OF PUBLIC SCHOOLS.

Supreme Court of Missouri, 1894. 122 Mo. 61, 27 S.W. 610, 26 L.R.A. 707.

Action by Anderson and others against the Board of President and Directors of Public Schools. From a judgment sustaining a demurrer to the petition, plaintiffs appeal.

BARCLAY, J. Plaintiffs appealed from a judgment based on a ruling sustaining a demurrer to their petition. The substance of their allegations is as follows:

Plaintiffs are copartners in the business of building. Defendant is a corporation having charge and control of the public schools and school property in the city of St. Louis. The defendant had a well-known rule in regard to buildings, by which it was provided that all new buildings, etc., should be “let by contract to the lowest and best bidder.” Defendant being desirous of erecting a large school building to be known as the “New High School,” duly advertised for bids for the erection thereof. The advertisement was this:

“Proposals for the Erection of the New High School Building on Grand Avenue. Office of Board of President and Directors of the St. Louis Public Schools. St. Louis, August 28, 1891. Sealed proposals will be received at the office of the secretary on or

⁶ *Varney v. Ditmars*, 217 N.Y. 223, 111 N.E. 822, Ann.Cas.1916B, 758 (1916).

before Monday, September 7, 1891, at 4 p. m., for the erection of the New High School on Grand avenue. All bids are to be addressed to John W. O'Connell, Esq., chairman building committee, and must be accompanied by a certified check, payable to the order of 'Board of President and Directors of the St. Louis Public Schools,' or cash, amounting to \$2,500, which is to be forfeited by the successful bidder if he fails or refuses within five days after the award of contract by this board to enter into written contract, and furnish good and sufficient security, for the faithful performance of the work." * * *

Plaintiffs submitted a bid (in accordance with the above advertisement) to build the proposed high school for \$196,965. Defendant refused to accept the bid of plaintiffs; but "without cause, arbitrarily and capriciously, through favoritism and bias," rejected it, and then accepted the bid of another for \$197,000. Plaintiffs alleged a loss of profits in the sum of \$15,000, and prayed judgment, etc.

The above is a sufficient outline of the facts on which plaintiffs rely.

It is claimed by defendant * * * that, as the plaintiffs' bid related to public work, no action can be maintained for the refusal to allow plaintiffs to execute such work. The contention is that bids for public work are not governed by the general principles of the law of contracts. We do not consider it necessary to examine into the soundness of that contention, as we think the ruling of the trial judge was obviously correct, even conceding to plaintiffs that the transaction should be treated as an ordinary one between individuals, irrespective of the supposed public nature of its subject-matter.

That binding obligations can originate in advertisements addressed to the general public may be assumed as settled law today. But the effect to be given to such an advertisement as the basis of a contract depends entirely on the intent manifested by its terms. A public proposal of that nature may be so expressed as to need but an acceptance, or the performance of some act by a person otherwise undesignated, to constitute an enforceable legal agreement. While, on the other hand, the proposal may amount to nothing more than a suggestion to induce offers of a contract by others. * * *

In the case in hand the advertisement has the following caption:

"Proposals for the Erection of the New High School Building on Grand Avenue." But the opening lines of the official statement, which follows, show that the caption refers to the proposals to be received, and is not intended to describe the effect of the advertisement as a whole. If there was otherwise any doubt on this point, it is set at rest by the last sentence, viz.: "*The board reserves the right to reject any or all bids.*" That language demonstrates the nature of the advertisement as a mere invitation for offers for a contract. As such it did not lay the foundation of a completed contract. It was merely the opening of negotiations for a contract. The plaintiffs' bid was a proposal to build, which the defendant, by the terms of its statement, had the right to reject.

The facts in judgment are wholly unlike those considered in *McNeil v. Boston Chamber of Commerce* (1891) 154 Mass. 277, 28 N.E. 245, 13 L.R.A. 559, cited on behalf of the plaintiffs. In that case it was found as a fact that the defendant had agreed with the bidders to accept the lowest bid, and accordingly was held liable for a breach of that agreement. But in *the present appeal that essential fact is wanting.* * * * The right to reject the bids was unconditional. Defendant was entitled to exercise that right for any cause it might deem satisfactory, or even without any assignable cause. * * * The judgment is affirmed.

COURTEEN SEED CO. v. ABRAHAM

Supreme Court of Oregon, 1929. 129 Or. 427, 275 P. 684.

BROWN, J. * * * The defendant assigns error of the court in overruling his motion for nonsuit in and by which he asserts that the evidence fails to show that defendant ever made a binding offer to plaintiff to sell clover seed.

Contracts in general are reached by an offer on the one side and acceptance on the other. 1 Page on the Law of Contracts, § 74. So it becomes necessary to determine whether the defendant actually offered to sell the clover seed to the plaintiff corporation, and whether it was defendant's intention that contractual relations should exist between them on plaintiff's acceptance.

The writing upon which the plaintiff relies to show an offer to sell is a telegram sent by defendant to plaintiff on October 8, 1927, which reads: "I am asking 23 cents per pound for the car of red clover seed from which your sample was taken. No. 1 seed, practically no plantain whatever. Have an offer 22 $\frac{3}{4}$ per pound, f. o. b. Amity."

Plaintiff's acceptance of the alleged offer reads: "Telegram received. We accept your offer. Ship promptly, route care Milwaukee Road at Omaha."

A contract should be construed to effect the intention of the parties thereto, as gathered from the entire writings constituting the contract. It is this intent that constitutes the essence of every contract. [Citations omitted.] Giving due consideration to every word contained in the defendant's telegram to plaintiff, we are not prepared to say that that telegram constituted an express offer to sell. It would be poor reasoning to say that the defendant meant to make the plaintiff an offer when he used this language: "I am asking 23 cents per pound for the car of red clover." That does not say, "I offer to you at 23 cents per pound the car of red clover," nor does it say, "I will sell to you the carload of red clover at 23 cents per pound." The writer of the telegram used the word "offer" with reference to some other person when he concluded by saying: "Have an offer 22 $\frac{3}{4}$ per pound, f. o. b. Amity." Each of the words "offer" and "asking" has its meaning; and we cannot assume that the writer of the telegram meant to use these words in the same sense, nor can we eliminate the word "asking" from the writing. * * *

It is laid down by eminent authority that information or invitation to negotiate does not constitute an offer. * * * "The commonest examples of offers meant to open negotiations and to call forth offers in the technical sense are the advertisements, circulars and trade letters sent out by business houses. While it is possible that the offers made by such means may be in such form as to become contracts, they are often merely expressions of a willingness to negotiate."

In the following section, the author sets out in this language many illustrations of offers to negotiate: "A statement by A to B of the price at which A will sell certain property is not equivalent to an offer by A to B to sell such property at such price; and B

cannot, by accepting such alleged offer, hold A upon a contract. If A writes, asking if certain realty was for sale, and if so 'telegraph lowest cash price,' and B's reply quotes a price, and A replies agreeing to buy at that price; or A lists property with B for sale at a specified price, and B notifies A that he will take it at that price; or A writes to B, 'I should hate to see these lands go at \$1,600 a piece net to me, but if you can find a buyer at that and get your commission above it, we will try to put the deal through,' and B accepts; or the owner of an interest in property telegraphs that he would not consider less than a certain amount therefor; or A asks B, the owner of certain property, if he will take a certain price therefor, and B attempts to accept such alleged offer and compel A to perform such contract; or A writes to B, 'We are authorized to offer Michigan fine salt in full carload lots of 80 to 95 barrels,' B telegraphs, 'Your letter of yesterday received and noted. You may ship me 2,000 barrels of Michigan fine salt as offered in your letter'; or where A wrote to B, 'We have a few jars that we can offer you at this time for immediate acceptance,' the price and place of delivery being given, no offer has been made in either case, and accordingly the attempted acceptance does not constitute a contract. If A telegraphs, 'Kindly advise us by wire Monday if you can use' a certain number of barrels at a certain price, and B replies, 'We accept your offer,' A has made no offer and B's acceptance can not complete the contract."

The author then refers to and quotes from the leading case of Nebraska Seed Co. v. Harsh, 98 Neb. 89, 152 N.W. 310, L.R.A. 1915F, 824. * * * In that case the Supreme Court of Nebraska held that the language, "I want \$2.25 per cwt. for this seed, f. o. b. Lowell," did not constitute an offer of sale; that the language was general, and, as such, might be used in an advertisement or circular addressed generally to those engaged in the seed business; and that such language was not an offer by which the defendant was bound, if accepted by any or all of the persons addressed. The court then quoted with approval from 9 Cyc. 278 E.

In the case of Moulton v. Kershaw et al., 59 Wis. 316, 18 N.W. 172, 48 Am.Rep. 516, the defendant wrote the plaintiff as follows: "In consequence of a rupture in the salt trade, we are authorized to offer Michigan fine salt, in full carload lots of 80 to 95 barrels.

delivered at your city, at 85 cts. per barrel, to be shipped per C. & N. W. R. R. Co. only. At this price it is a bargain, as the price in general remains unchanged. Shall be pleased to receive your order."

On the day the plaintiff received this letter, he wired the defendants of his acceptance, and ordered 2,000 barrels of salt. In its disposition of the case, the Supreme Court of Wisconsin held that the letter upon which the plaintiff relied did not constitute an offer, for the reason that neither the word "sell" nor its equivalent was used therein.

There are many cases of record, the great majority of which seem to follow the doctrine announced in the cases hereinabove discussed. From a review of the decisions, and of the law governing the question at issue in the instant case, we are of opinion that the motion for a nonsuit should have been sustained.

This cause is reversed and remanded, with directions to enter a nonsuit.

FAIRMOUNT GLASS WORKS v. GRUNDEN-MARTIN CO.

Court of Appeals of Kentucky, 1899.
106 Ky. 659, 51 S.W. 196, 21 Ky.Law Rep. 264.

HOBSON, J. On April 20, 1895, appellee wrote appellant the following letter:

"St. Louis, Mo., April 20, 1895. Gentlemen: Please advise us the lowest price you can make us on our order for ten carloads of Mason green jars, complete, with caps, packed one dozen in a case, either delivered here, or f. o. b. cars your place, as you prefer. State terms and cash discount. Very truly, Grunden-Martin W. W. Co."

To this letter appellant answered as follows:

Fairmount, Ind., April 23, 1895. Grunden-Martin Wooden Ware Co., St. Louis, Mo.—Gentlemen: Replying to your favor of April 20, we quote you Mason fruit jars, complete, in one-dozen boxes, delivered in East St. Louis, Ill.: Pints \$4.50, quarts \$5.00, half gallons \$6.50, per gross, for immediate acceptance, and shipment not later than May 15, 1895; sixty days' acceptance,

or 2 off, cash in ten days. Yours, truly, Fairmount Glass Works. * * *

For reply thereto, appellee sent the following telegram on April 24, 1895:

"Fairmount Glass Works, Fairmount, Ind.: Your letter twenty-third received. Enter order ten car loads as per your quotation. Specifications mailed. Grunden-Martin W. W. Co."

In response to this telegram, appellant sent the following:

"Fairmount, Ind., April 24, 1895. Grunden-Martin W. W. Co., St. Louis, Mo.: Impossible to book your order. Output all sold. See letter. Fairmount Glass Works."

Appellee insists that, by its telegram sent in answer to the letter of April 23d, the contract was closed for the purchase of 10 car loads of Mason fruit jars. Appellant insists that the contract was not closed by this telegram, and that it had the right to decline to fill the order at the time it sent its telegram of April 24. This is the chief question in the case. The court below gave judgment in favor of appellee, and appellant has appealed, earnestly insisting that the judgment is erroneous.

We are referred to a number of authorities holding that a quotation of prices is not an offer to sell, in the sense that a completed contract will arise out of the giving of an order for merchandise in accordance with the proposed terms. There are a number of cases holding that the transaction is not completed until the order so made is accepted. [Citations omitted.] But each case must turn largely upon the language there used. In this case we think there was more than a quotation of prices, although appellant's letter uses the word "quote" in stating the prices given. The true meaning of the correspondence must be determined by reading it as a whole. Appellee's letter of April 20th, which began the transaction, did not ask for a quotation of prices. It reads: "Please advise us the lowest price you can make us on our order for ten car loads of Mason green jars. * * * State terms and cash discount." From this appellant could not fail to understand that appellee wanted to know at what price it would sell it ten car loads of these jars; so when, in answer, it wrote: "We quote you Mason fruit jars * * * pints \$4.50, quarts \$5.00, half gallons \$6.50, per gross, for immediate acceptance; * * * 2 off, cash in ten days,"—it must be deemed as

intending to give appellee the information it had asked for. We can hardly understand what was meant by the words "for immediate acceptance," unless the latter was intended as a proposition to sell at these prices if accepted immediately. * * * Appellee's letter was plainly an inquiry for the price and terms on which appellant would sell it the goods, and appellant's answer to it was not a quotation of prices, but a definite offer to sell on the terms indicated, and could not be withdrawn after the terms had been accepted.

Judgment affirmed.⁷

DONNELLY v. CURRIE HARDWARE CO.

Supreme Court of New Jersey, 1901. 66 N.J.L. 388, 49 A. 428.

Action by Daniel R. Donnelly against the Currie Hardware Company. Judgment for plaintiff, and defendant brings error. Reversed.

DIXON, J. The plaintiff, being about to bid for a contract to build a music pavilion in Atlantic City, submitted the plans and specifications to the defendant for an estimate as to the price at which the latter would do the metal work required, and on March 31, 1899, received a letter from the defendant saying that it would do the work for \$2,850. Accordingly the plaintiff put in his bid for the construction of the building, and, after the making of some changes not affecting the metal work, the job was awarded to him, and the contract was signed on April 5, 1899. During the next morning the plaintiff telephoned to the defendant's manager that he had signed a contract for the building, and would be pre-

⁷ In Lovett v. Frederick Loeser & Co., 124 Misc. 81, 207 N.Y.S. 753 (1924), a department store advertised radio sets, saying, "Your choice, 25% reduction on any set." Plaintiff sent an unconditional acceptance of the assumed offer, ordering two sets. *Held*, no contract. "The defendants' advertisement is nothing but an invitation to enter into negotiations, and is not an offer which may be turned into a contract."

Restatement of the Law of Contracts, § 25: "If from a promise, or manifestation of intention, or from the circumstances existing at the time, the person to whom the promise or manifestation is addressed knows or has reason to know that the person making it does not intend it as an expression of fixed purpose until he has given a further expression of assent, he has not made an offer."

pared to sign a written contract with the defendant at 4 o'clock that afternoon, to which the manager answered, "All right." Shortly before that hour the plaintiff telephoned to the manager that he had not had time to prepare the contract, and would sign it in the morning, to which the manager again replied, "All right." The next morning the plaintiff called on the manager, and the latter informed the plaintiff that the defendant would be unable to perform the work in the time agreed upon by the plaintiff, and had not room to do the work so quickly, and refused to sign the proposed contract. Afterwards the plaintiff was compelled to pay a higher price for the metal work, and brought this suit for breach of contract. On this state of facts, shown by the plaintiff's evidence, the defendant moved for a nonsuit, and for direction of a verdict in favor of defendant. These motions being overruled, exceptions were taken.

The case is governed by the rule established in *Water Commissioners v. Brown*, 32 N.J.L. 504, where Mr. Justice Elmer, speaking for the court of errors, said: "If it appears that the parties, although they have agreed on all the terms of their contract, mean to have them reduced to writing and signed before the bargain shall be considered as complete, neither party will be bound until that is done, so long as the contract remains without any acts done under it on either side." The conversations over the telephone between the plaintiff and the defendant's manager, as well as the testimony of the plaintiff himself, make it clear that a written contract was expected by both parties. Indeed, it cannot reasonably be determined that the parties had agreed upon all the matters which they would expect to have included in their bargain; for the time allowed for the beginning and completion of the work and the mode of payment are generally provided for expressly in such arrangements, and on these points their negotiations had been silent, awaiting, probably, the outcome of the plaintiff's proposal for the erection of the building. We therefore think that no contract was made by the defendant and that the motions mentioned should have prevailed.

The judgment is reversed.⁸

⁸ In *Mississippi & D. Steamship Co. v. Swift*, 86 Me. 248, 29 A. 1063, 1066, 41 Am.St.Rep. 545 (1894), it was said: "The question is mainly one of in-

tention. If the written draft is viewed by the parties as a convenient memorial or record of their previous contract, its absence does not affect

SECTION 3.—DURATION OF OFFERS

An offer will terminate so that a subsequent acceptance will have no effect, in any one of the following ways:

- (a) Lapse of the time specified in the offer;
- (b) Lapse of a reasonable time, where none is specified;
- (c) Death or insanity of the offeror or of the offeree;
- (d) Revocation by the offeror;
- (e) Rejection by the offeree.

Since an offer is an expression of intention on the part of the person making the offer to enter into new legal relations with the offeree, the question immediately arises: How long will the offer last? Every moment of its duration is regarded as a repetition of the offer; and from its inception to its termination a power exists in the offeree to change its character from an offer to a binding promise by his acceptance. What circumstances, then, will operate to bring an offer to a close? In the first place, since the offer is made by one of the parties alone, his will, expressed or implied, will be determinative of the question of the offer's duration, as well as of all its terms. The offeror is "the lord of his offer." If he has indicated its duration as a term therein, the offer will be terminated by the lapse of the specified time. If no time is specified, then the offeror's apparent intention as to how long the offer was to last is to be gathered from the circumstances of the case.

(A) TERMINATION BY LAPSE OF THE TIME SPECIFIED IN THE OFFER

When the offeror stipulates that the offer must be accepted within a stated time, there is no contract if the acceptance is made

the binding force of the contract; if however, it is viewed as consummation of the negotiation, there is no contract until the written draft is finally signed."

In *Berman v. Rosenberg*, 115 Me. 19, 97 A. 6, it is said: "It is settled

that the fact that parties negotiating a contract contemplate that a formal agreement shall be made and signed is some evidence that they do not intend to bind themselves until the agreement is reduced to writing and signed."

after the given time. For example, if A sends an offer to B through the mails and A requests an answer by return mail, there is no contract if B does not dispatch a letter of acceptance on the day the offer is received. Similarly, if A's offer had instead requested a reply within three days, the offer would be automatically terminated if B did not reply within the given time. An offeror who receives an acceptance which is too late, or which is defective in some other way, cannot at his election regard it as a valid acceptance. The late or defective acceptance is viewed as a counter-offer which must, in turn, be accepted by the original offeror in order to effect a contract.

Where the offeree accepts the offer after the stipulated time, the offeror is not under any legal obligation to the offeree and need not notify the offeree that the acceptance was too late.

No one may accept an offer other than the person or persons to whom it is made. Consequently an offer made to a group of persons does not become a binding contract until it has been accepted by all of the offerees. An offer to a partnership composed of A and B terminates on the death of A, for B alone cannot accept.

MACLAY v. HARVEY.

Supreme Court of Illinois, 1878. 90 Ill. 525, 32 Am. Rep. 35.

Mr. Justice SCHOLFIELD delivered the opinion of the court.

[Action on an alleged contract whereby the appellee employed the appellant to take charge of the millinery department of his store at Monmouth, Ill., and to pay her therefor \$15 per week. On March 22, appellant received from appellee the following letter:]

"Monmouth, Ill., March 21, 1876.

"Miss L. Maclay, Peoria, Ill.: I would like for you to trim at H. W. Wetherell's or at Kieth Bros. I will give you \$15 per week and pay your fare from Chicago to Monmouth. * * * You will confer a favor by giving me your answer by return mail.

"Yours,

John Harvey."

Appellant says she received this in the afternoon, and replied the next day by postal card [accepting the position]. Appellant

did not place this in the post office herself, but she says she gave it to a boy who did errands about the house of her sister, with whom she was then staying, directing him to place it in the office. The post mark on the card, which is shown to be always placed on mail matter the same day it is put in the office, shows that the card was not mailed until the 25th of March. * * *

If a contract was consummated between the parties, it was by the mailing of appellant's postal card on the 25th of March. * * * It was said by the Lord Chancellor, in *Dunlop v. Higgins*, 1 House of Lords Cases, at page 387: "Where an individual makes an offer by post, stipulating for, or by the nature of the business having the right to expect, an answer by return of post, the offer can only endure for a limited time, and the making of it is accompanied by an implied stipulation that the answer shall be sent by return of post. If that implied stipulation is not satisfied, the person making the offer is released from it. * * *"

This is regarded as a leading case on the question of acceptance of contract by letter, and the language quoted we regard as a clear and accurate statement of the law, as applicable to the present case. It is clear here that the nature of the business demanded a prompt answer, and the words "You will confer a favor by giving me your answer by return mail" do, in effect, "stipulate" for an answer by return mail. *Taylor v. Rennie, et al.*, 35 Barb. N.Y. 272. * * * Appellee was, therefore, entitled to expect a reply mailed on the 23d, which he ought to have received on that day, or, at farthest, by the morning of the 24th; but appellant's reply was not mailed until the 25th. It does not relieve appellant of fault that she gave the postal card to a boy on the 23d, to have him mail it. Her duty was not to place an answer in private hands, but in the post office. The boy was her agent, not that of appellee, and his negligence in mailing the postal card was her negligence. * * *

Judgment affirmed.

(B) TERMINATION BY LAPSE OF REASONABLE TIME, WHERE
NONE SPECIFIED

If the offeror does not specify the duration of time within which acceptance may be made, then the offer is open for a reasonable

time; and if there is no acceptance before a reasonable period of time elapses, the offer is terminated. The offer must be accepted within a reasonable time after the offer has been made, and what is a reasonable time will depend on the circumstances and facts of each particular case. The following facts should be taken into consideration in determining what is a reasonable time; the nature of the goods; fluctuations in market price, if any; and the distance between the offeror and offeree.

At times the offeror is under a duty to notify the offeree that the acceptance was not made in a reasonable time. This is usually so where the parties, as well as courts and juries, may honestly differ as to what a reasonable time is under the circumstances. The offeree, in such a case, may believe his acceptance was timely and so expend time and money relying on the existence of a contract. Under such circumstances the presumption will be that the offer was accepted within a reasonable time because the acceptance was received by the offeror without objection. However, if the acceptance took place at a time when no reasonable man could believe that the offer was accepted within a reasonable time then the offeror is under no obligation to notify the offeree that the acceptance was too late. But even in a case where the offeror notifies the offeree that his acceptance was too late, the question of reasonableness of time is still for the jury to decide. The offeror's notification is not conclusive. It is only one of the facts to be taken into consideration by the jury.

MINNESOTA LINSEED OIL CO. v. COLLIER WHITE-
LEAD CO.

Circuit Court of the United States, D. Minnesota, 1876. Fed.Cas.No. 9,635.

[Plaintiff sues for \$2,151.50 claimed to be due for oil sold to the defendant. Defendant set up a counterclaim for damages for breach of a contract by plaintiff to sell linseed oil at fifty-eight (58) cents per gallon, in that plaintiff refused to deliver the oil; that the market price of oil during the period covered by the contract was not less than seventy (70) cents per gallon; and that by reason of plaintiff's breach, defendant was damaged to the extent of the difference between the contract price and the market price, for which defendant claims a set-off to plaintiff's

cause of action. The reply of the plaintiff denies that any contract was entered into.]

The plaintiff resided at Minneapolis, Minnesota, and the defendant was the resident agent of the plaintiff, at St. Louis, Missouri. The contract is alleged to have been made by telegraph.

The plaintiff sent the following dispatch to the defendant: "Minneapolis, July 29, 1875. To Alex. Easton, Secretary Collier White Lead Company, St. Louis, Missouri: Account of sales not enclosed in yours of 27th. Please wire us best offer for round lot named by you—one hundred barrels shipped. Minnesota Linseed Oil Company."

The following answer was received: "St. Louis, Mo., July 30, 1875. To the Minnesota Linseed Oil Company: Three hundred barrels fifty-five cents here, thirty days, no commission, August delivery. Answer. Collier Company."

The following reply was returned: "Minneapolis, July 31, 1875. Will accept fifty-eight cents (58c), on terms named in your telegram. Minnesota Linseed Oil Company."

This dispatch was transmitted Saturday, July 31, 1875, at 9:15 p.m., and was not delivered to the defendant in St. Louis, until Monday morning, August 2, between eight and nine o'clock.

On Tuesday, August 3, at 8:53 a. m., the following dispatch was deposited for transmission in the telegraph office: "St. Louis, Mo., August 3, 1875. To Minnesota Linseed Oil Company, Minneapolis: Offer accepted—ship three hundred barrels as soon as possible. Collier Company."

The following telegrams passed between the parties after the last one was deposited in the office at St. Louis: "Minneapolis, August 3, 1875. To Collier Company, St. Louis: We must withdraw our offer wired July 31st. Minnesota Linseed Oil Company."

Answered: "St. Louis, August 3, 1875. Minnesota Linseed Oil Company: Sale effected before your request to withdraw was received. When will you ship? Collier Company."

It appeared that the market was very much unsettled, and that the price of oil was subject to sudden fluctuations during the month previous and at the time of this negotiation, varying from day to day, and ranging between fifty-five and seventy-five cents per gallon. It is urged by the defendant that the dispatch of Tues-

day, August 3d, 1875, accepting the offer of the plaintiff transmitted July 31st, and delivered Monday morning, August 2d, concluded a contract for the sale of the twelve thousand four hundred and fifty gallons of oil. The plaintiff, on the contrary claims, 1st, that the dispatch accepting the proposition made July 31st, was not received until after the offer had been withdrawn; 2d, that the acceptance of the offer was not in due time; that the delay was unreasonable, and therefore no contract was completed.

NELSON, District Judge. It is well settled by the authorities in this country, and sustained by the later English decisions, that there is no difference in the rules governing the negotiation of contracts by correspondence through the post-office and by telegraph, and a contract is concluded when an acceptance of a proposition is deposited in the telegraph office for transmission. See 14 Am.Law Reg. 401, "Contracts by Telegraph," article by Judge Redfield, and authorities cited; also, Trevor v. Wood, 36 N.Y. 307. * * *

This rule is not strenuously dissented from on the argument, and it is substantially admitted that the acceptance of an offer by a letter or by telegraph completes the contract, when such acceptance is put in the proper and usual way of being communicated by the agency employed to carry it; and that when an offer is made by telegraph, an acceptance by telegraph takes effect when the dispatch containing the acceptance is deposited for transmission in the telegraph office, and not when it is received by the other party. Conceding this, there remains only one question to decide, which will determine the issues: Was the acceptance of defendant deposited in the telegraph office Tuesday, August 3d, within a reasonable time, so as to consummate a contract binding upon the plaintiff?

It is undoubtedly the rule that when a proposition is made under the circumstances in this case, an acceptance concludes the contract if the offer is still open, and the mutual consent necessary to convert the offer of one party into a binding contract by the acceptance of the other is established, if such acceptance is within a reasonable time after the offer was received.

The better opinion is, that what is, or is not, a reasonable time, must depend upon the circumstances attending the negotiation, and the character of the subject matter of the contract, and

in no better way can the intention of the parties be determined. If the negotiation is in respect to an article stable in price, there is not so much reason for an immediate acceptance of the offer, and the same rule would not apply as in a case where the negotiation related to an article subject to sudden and great fluctuations in the market.

The rule in regard to the length of the time an offer shall continue, and when an acceptance completes the contract, is laid down in Parsons on Contracts (volume 1, p. 482). He says: "It may be said that whether the offer be made for a time certain or not, the intention or understanding of the parties is to govern.

* * * If no definite time is stated, then the inquiry as to a reasonable time resolves itself into an inquiry as to what time it is rational to suppose the parties contemplated; and the law will decide this to be that time which as rational men they ought to have understood each other to have had in mind." Applying this rule, it seems clear that the intention of the plaintiff, in making the offer by telegraph, to sell an article which fluctuates so much in price, must have been upon the understanding that the acceptance, if at all, should be immediate, and as soon after the receipt of the offer as would give a fair opportunity for consideration. The delay here was too long, and manifestly unjust to the plaintiff, for it afforded the defendant an opportunity to take advantage of a change in the market, and accept or refuse the offer as would best subserve its interests.

Judgment will be entered in favor of the plaintiff for the amount claimed. The counter-claim is denied. Judgment accordingly.

(C) TERMINATION BY DEATH OR INSANITY OF OFFEROR

The death or insanity of the offeror before acceptance of the offer will terminate the offer. The insanity must be such as to deprive the party of contractual capacity so that there can be no meeting of the minds.

The death or insanity of the offeror terminates the offer even though the offeree is ignorant of the fact when he accepts. If A sends an offer to B, and A dies or becomes insane before B accepts, the offer is revoked in law. There must be two parties

capable of contracting at the moment of acceptance. However, if the acceptance is, for instance, by mail, the death of the offeror before he receives the acceptance, but after it has been mailed, will not act as a revocation of the offer because the acceptance by mail takes effect the moment it is mailed. For example, A sends an offer by mail on Jan. 1st. It is received Jan. 3rd and a letter of acceptance is mailed the same day. A dies on Jan. 4th, and the letter arrives Jan. 5th. There was a binding contract formed on Jan. 3rd before A died. In such a case A's death does not prevent the formation of the contract.

JONES v. UNION CENTRAL LIFE INS. CO.

Supreme Court of New York, Appellate Division, Fourth Department, 1943.
265 App.Div. 388, 40 N.Y.S.2d 74.

CUNNINGHAM, J. This action is brought by the plaintiff to recover the face value of a life insurance policy No. 1214142, in which she is named as beneficiary.

A summary judgment has been granted in favor of the plaintiff, the affidavits showing that the facts are not in dispute.

The policy was issued by defendant on August 24, 1934, to plaintiff's husband, Ray D. Jones, insuring his life for the sum of \$5000. Mr. Jones died on February 6, 1941.

The insured defaulted in the payment of the premium due on this policy in November, 1940, and it is claimed by the plaintiff that thereupon, under its terms, it became an extended term policy, for two and a half years, in the amount of \$5000. The defendant, on the other hand, claims that through negotiations between agents of defendant and the insured before the latter's death, the policy had been converted into a paid-up policy of about \$900. This is the dispute between the parties in this case.

* * *

The policy provides that upon the nonpayment of a premium, the cash surrender value of the policy may be used in one of several ways. Option 1 provides for the conversion of the policy into one of extended term insurance for a limited period, for the full face value of \$5000. Option 2 provides that the cash surrender value may be applied to the purchase of nonparticipating paid-

up whole life insurance, upon the written request of the insured and upon the surrender of the policy "before the expiration of the days of grace". The insured did not accept Option 2 or any other option before the termination of the days of grace.

Another provision of the policy is as follows: "If, on failure to pay a premium, no option is exercised, such value shall be applied as provided in Option 1."

Therefore, after the expiration of the days of grace, the policy in suit automatically became a paid-up policy for the face value thereof, for an extended term of about two and a half years.

[By a provision in the policy this extended term could not be changed or altered except by an "agreement in writing" signed by the president or other official of the company.

In December, 1940, the insured became unable to pay the premium on this policy. On January 31, 1941, insured signed an application to convert to paid-up insurance. On February 6, 1941, insured died. Under date of February 11, 1941, the company endorsed on the policy the change thereof to paid-up insurance.]

The acceptance by the company was made after the death of the insured. The rights of the insurer and the beneficiary of the insured became fixed by the death of the insured, as such rights existed at that time, and, therefore, the extended insurance in force could not be thereafter changed by the insurer. Lange v. Metropolitan Life Insurance Co., 252 App.Div. 696, 700, 1 N.Y.S.2d 821, affirmed 278 N.Y. 626, 16 N.E.2d 293.

The application by the insured for [paid-up] insurance was nothing more than an offer of the insured to make a contract to that effect, and such offer could have been revoked at any time before acceptance. Petterson v. Pattberg, 248 N.Y. 86, 161 N.E. 428; Cochran v. Taylor, 273 N.Y. 172, 7 N.E.2d 89.

It is the rule that a revocable offer is revoked by the death of the person making the offer. 23rd Street Baptist Church v. Cornell, 117 N.Y. 601, 23 N.E. 177, 6 L.R.A. 807; Williston on Contracts, Rev.Ed., Vol. 1, § 62; Restatement of the Law of Contracts, Vol. 1, page 56, § 48; Vol. 17, C.J.S., Contracts, page 400, § 51c. * * *

(D) TERMINATION BY REVOCATION

1. *In General*

Until the moment of acceptance, an offer may be revoked, and a subsequent acceptance will be inoperative. This follows necessarily from the fact that an offer, unaccepted, creates no rights and may therefore be withdrawn.

Revocation takes effect only when communicated to the offeree.

A letter of revocation does not speak from the time it is mailed, as in the case of acceptance, but from the time it is received. Suppose that on Jan. 1st A mails an offer to B and B receives it on Jan. 3d, and mails a letter of acceptance the same day. On Jan. 2d A mails a letter revoking the offer that B receives on Jan. 4th. A receives B's acceptance on Jan. 5th. Is there a binding contract? It is clear that there is. The contract was made on Jan. 3d when B mailed his letter of acceptance. The revocation is of no effect as it arrived on Jan. 4th and a revocation speaks from the time it is received.

The revocation need not be made directly to the offeree. It is sufficient that the offeree becomes aware of the revocation through any reliable source. Revocation may take place by an act inconsistent with the offer made. For example, A offers to sell his horse to B for \$100. Before B accepts the offer he notices C riding the horse. Upon inquiry B learns from C that C had just purchased the horse from A. This is as effective a revocation as if A had personally, or through the mails, retracted the offer before acceptance. But as long as the revocation is uncommunicated to the offeree, the offeree can accept the offer even though the offeror has changed his mind or sold the subject matter of the contract.

Where the offeror sends the offeree a letter of revocation, it is not necessary that the offeree should read the letter. When the letter comes into the offeree's possession, or letter box, or any place where he usually receives mail, the law presumes notice of the contents to him.

BYRNE & CO. v. LEON VAN TIENHOVEN & CO.

Common Pleas Division, 1880. L.R. 5 Com. Pl. Div. 344.

[The defendant company, doing business at Cardiff, England on October 1, 1879, wrote the plaintiffs at New York, offering to sell 1,000 boxes of tinplates at a price specified. On the 11th of October, immediately upon receipt of this offer, the plaintiffs cabled an unqualified acceptance, at the same time confirming their cable by letter which was received by the defendants in due course of post. On the 8th of October, the defendant company mailed to the plaintiffs a letter revoking their offer of the 1st instant, which revocation was received by the plaintiffs on the 20th of October.]

LINDLEY, J. This was an action for the recovery of damages for the nondelivery by the defendants to the plaintiffs of 1,000 boxes of tinplates, pursuant to an alleged contract. * * *

There is no doubt that an offer can be withdrawn before it is accepted, and it is immaterial whether the offer is expressed to be open for acceptance for a given time or not. *Routledge v. Grant*, 4 Bing. 653. For the decision of the present case, however, it is necessary to consider two other questions, viz.: 1. Whether a withdrawal of an offer has any effect until it is communicated to the person to whom the offer has been sent? 2. Whether posting a letter of withdrawal is a communication to the person to whom the letter is sent? * * *

The offer was posted on the 1st of October, the withdrawal was posted on the 8th, and did not reach the plaintiff until after he had posted his letter of the 11th, accepting the offer. It may be taken as now settled that where an offer is made and accepted by letters sent through the post, the contract is completed the moment the letter accepting the offer is posted (*Harris' Case*, Law Rep. 7 Ch. 587; *Dunlop v. Higgins*, 1 H.L. 381), even although it never reaches its destination. When, however, these authorities are looked at, it will be seen that they are based upon the principle that the writer of the offer has expressly or impliedly assented to treat an answer to him by a letter duly posted as a sufficient acceptance and notification to himself, or, in other words, he has made the post office his agent to receive the acceptance and notification of it. But this principle appears to me to be in-

applicable to the case of the withdrawal of an offer. In this particular case I can find no evidence of any authority in fact given by the plaintiffs to the defendants to notify a withdrawal of their offer by merely posting a letter; and there is no legal principle or decision which compels me to hold, contrary to the fact, that the letter of the 8th of October is to be treated as communicated to the plaintiff on that day or on any day before the 20th, when the letter reached them. But before that letter had reached the plaintiffs they had accepted the offer, both by telegram and by post; and they had themselves resold the tinplates at a profit. In my opinion the withdrawal by the defendants on the 8th of October of their offer of the 1st was inoperative; and a complete contract binding on both parties was entered into on the 11th of October, when the plaintiffs accepted the offer of the 1st, which they had no reason to suppose had been withdrawn.

Before leaving this part of the case it may be as well to point out the extreme injustice and inconvenience which any other conclusion would produce. If the defendants' contention were to prevail no person who had received an offer by post and had accepted it would know his position until he had waited such a time as to be quite sure that a letter withdrawing the offer had not been posted before his acceptance of it. It appears to me that both legal principles, and practical convenience, require that a person who has accepted an offer not known to him to have been revoked, shall be in a position safely to act upon the footing that the offer and acceptance constitute a contract binding on both parties. * * *

For the reasons above stated I give judgment for the plaintiffs for £375 and costs.

Judgment for plaintiffs.

2. *Revocation of Unilateral Offers*

A unilateral offer being an offer of a promise for an act, there is no acceptance until the act has been completed. Further, the offer having been made by one of the parties alone, he may put an end to that which he has created. Therefore the offeror may terminate the offer at any time before acceptance. Suppose that A offers B \$100 to plow his field. B, without obligating himself

by any promise to do so, starts plowing the field. Suppose, further, that when B has only one furrow left to plow to finish the job, A tells B, "I revoke my offer." Since the offeror can revoke at any time up to acceptance, and since a unilateral offer is accepted only when the act is completed, it is clear that in these circumstances, until the last furrow is plowed, there is no contract. The logic of this conclusion is clear, for at any time B could have stopped work, and A would have had no right of action against him. B was not bound and therefore A could revoke.

The apparent injustice of the operation of these rules is compensated by allowing a recovery in such case upon another theory than that of contract, called *quasi contract*. The basis of the idea of quasi contractual liability is unjust enrichment. The law provides that a person may not receive a benefit at the hands of another, under circumstances which negative the idea of a gift, without paying the reasonable value of that benefit. B, then, in the case mentioned, would be entitled to recover from A, not the \$100, but the reasonable value or amount which he has been benefited by the plowing. This reasonable value is not measured by the cost to the actor, B, but by the actual gain to A. In any case in which there is no gain or benefit, there can be no recovery on this theory, despite the amount of loss.

There are several other theories besides that of quasi contract on which the courts have allowed recovery in the case of revocation of a unilateral offer. Some courts have said that the partial performance constitutes a sufficient consideration to support an implied collateral contract to keep the offer open, and recovery has been allowed on the collateral contract. Also a tort theory has been suggested in some of the cases.

3. Revocation of Offer Confirmed by an Option

An apparent exception to the rule that an offeror may revoke at any time up to acceptance is found in the case of options. If Smith offers to sell his land to Brown for \$10,000, and also offers to hold this offer open for ten days if B will agree to pay him \$100 for the privilege, it will be observed that here A has made two distinct offers. The offer to hold open the offer to sell, for a

consideration, is called an offer of an option. Acceptance of this offer forms an option contract; a contract to hold the original offer open and not revoke. The option itself is therefore a contract, performance of which is the holding of the original offer open. Therefore there can be no revocation.

4. *Effect of Revocation on Recovery of Deposit Accompanying Contractor's Bid*

In building contracts, the notice to bidders soliciting bids is merely a preliminary invitation for offers. The bids themselves are the offers, and the act of the owner in selecting and notifying the successful bidder is the acceptance.

An attempt is often made to prevent the revocation of such offers by requiring the bidders to post a money deposit with the bid, to be forfeited if the bid is withdrawn. Such a provision is inoperative in law, since any offer may be revoked at any time before acceptance, at least where the offeror has received no consideration for the offer. Unless both parties are bound, neither is bound. After an unconditional acceptance, however, the bid may not be revoked, for the offer has become a promise and both parties are bound.

NORTHEASTERN CONST. CO. v. TOWN OF NORTH HEMSTEAD et al.

Supreme Court of New York, Appellate Division, Second Department, 1907.
121 App.Div. 187, 105 N.Y.S. 581.

WOODWARD, J. The parties to this action have submitted an agreed state of facts, under the provisions of sections 1279 to 1281 of the Code of Civil Procedure, and must be deemed to have waived all technical questions and to have asked the court for a determination of their rights under the facts as thus stated. The board of highway commissioners of the town of North Hempstead, on or about the 10th day of June, 1906, published a notice requesting the submission of bids for the erection of a concrete steel bridge over Udall's mill pond at Great Neck, Nassau county. The notice stated, among other things, where the plans and specifications could be found, and that a certified check for the sum

of \$1,000 must be delivered with each bid. The plaintiff procured a copy of the plans and specifications, which included, in fact, two plans, one for a four-span bridge and the other for a five-span bridge, and with these plans and specifications before it, on the 3d day of July, 1906, wrote and forwarded a letter, the material portion of which reads as follows:

"For the sum of twenty-three thousand nine hundred and fifty-nine dollars (\$23,959) we will furnish all materials and labor, and build complete a concrete steel arch bridge of five spans across Udall's mill pond," etc., and "for the sum of twenty-two thousand two hundred dollars (\$22,200) we will furnish all materials and labor and build a four-span concrete steel arch bridge across Udall's mill pond."

With this letter was a certified check for the sum of \$1,000. On the same day the said board of highway commissioners, in joint session with the town board of the town of North Hempstead, adopted a resolution:

"That the secretary notify the Northeastern Construction Company that their bid for construction of the bridge across Udall's pond, Great Neck, be accepted, conditioned upon leave being granted by the board of supervisors to issue bonds of the town in the sum of \$20,000."

On the morning of the 5th day of July, and before the defendants had taken any steps to communicate this alleged acceptance to the plaintiff, the latter sent a telegram to one of the members of the board of highway commissioners, and to the engineer of such board, not to consider the bid, saying that a letter would follow, and subsequently a letter was duly sent and received by the commissioners, in which the plaintiff claimed to have made an error in each of the two bids aggregating \$10,000, and withdrawing the bid. The plaintiff refusing to abide by its bid, the contract was let to the next lowest bidder at a price considerably higher than that of the plaintiff, and the defendants then procured the certified check to be cashed, and they have refused to return the same to the plaintiff, though the same has been demanded. The plaintiff seeks to recover the amount of the check, with interest.

We are of the opinion that the plaintiff is entitled to a return of the deposit. The defendants did not absolutely accept the

plaintiff's bid. The acceptance depended upon a contingency which the plaintiff was not asked to consider in making its bid. The defendants were not bound to take any steps to bring about the action of the board of supervisors, and if they had refused or neglected to have done so, or if the board, in the exercise of its discretion, had refused to grant the right, the defendants could not have been held to any degree of liability to the plaintiff, and it is elementary in contract law that both parties must be bound. So that at the time of the plaintiff's telegram, and at the time its letter was written, there was no valid or binding contract, and so long as there was not a valid contract the plaintiff was free to withdraw its proposition, without sacrificing the deposit which it had been compelled to make as a condition of bidding. But beyond this it is difficult to understand how the plaintiff could be said to have been bound. Two bids were asked for, two bids were made, and there was but one bridge to be constructed. The general resolution of acceptance of the plaintiff's proposition was not entering into a contract for the construction of a four or five span bridge. It was merely a notification that both of the bids were lower than other bids, but the contract was yet to follow; and this was clearly contemplated by the form which was given out for such a contract, in company with the plans and specifications.

In justice and equity the plaintiff is entitled to a return of its money under the facts disclosed, and judgment should be entered accordingly. * * *

5. Recovery of Deposit Where Bid is Made Irrevocable by Statute

Where bids are made for public works, in a state where by statute it is provided that the required deposit to accompany all bids be forfeited if the offeror revokes his offer, such bid or offer is irrevocable, at least to the extent of the deposit.

(E) TERMINATION BY REJECTION

The rejection or refusal of an offer by the person to whom it is made definitely terminates the offer. The offeree, after his rejection, cannot then change his mind and accept, for the offer is no

longer in existence. Such an acceptance, following a rejection, is no acceptance at all, but a new offer.

So, also, a failure to comply with a term of the offer as to the mode of acceptance, or an acceptance conditionally, or on terms varied from the terms of the offer, will operate as a rejection and put an end to the offer.

SECTION 4.—REQUISITES OF AN ACCEPTANCE

(A) CONFORMITY WITH OFFER

The acceptance of an offer must be absolute, unconditional, and identical with the terms of the offer, in order to result in a contract. If a condition is inserted, or a new term introduced, there is in reality no acceptance, but a counter offer, which in turn must be accepted before there can be an agreement.

It is essential that the acceptance shall be made in the manner, at the place, and within the time expressly or impliedly designated in the offer. If the offer specifies a time for the acceptance, it is a term of the offer, and an acceptance after the specified time will have no effect. An offer by correspondence calling for an answer "in course of post," or "by return mail," must be accepted by return mail, which is any mail outgoing that day. Such acceptance sent three or four days after the receipt of the offer has been held too late, and it seems that a delay of one day would be equally fatal.

If the offeree accepts conditionally, or introduces a new term into the acceptance, his answer is not an acceptance. It is either a rejection or a counter-offer, or a willingness to continue negotiations under certain conditions and not necessarily a rejection or a counter-offer. If A offers to sell his automobile to B for \$200 and B answers that he will accept if A puts on new tires, then B's conditional acceptance is a counter-offer. But if B had answered he will accept if he receives his salary at the end of the week, then B's answer is merely conditional acceptance and not a counter-offer or rejection. In the latter case B did not add any new terms to the offer or express dissatisfaction with the terms

contained in it, therefore the offer is not rejected by B and it is still open. However, a contract would not be formed automatically if B received his salary at the end of the week. He would have to accept the offer again, but this time unconditionally, if the offer was still open. An acceptance varying the terms of the offer is a rejection of the offer and the offer can no longer be accepted. This point is illustrated by the first hypothetical case given above. However, conditions in the acceptance which do not qualify the offer in legal effect do not impair the acceptance —the second hypothetical case is an example of this rule. Nor do added terms requested as a favor invalidate an acceptance if it is clear that the offer is unequivocally accepted whether or not such request is granted. For example, A offers to sell his car to B for \$200, B accepts unconditionally and then adds, "Will you please put on new hub-caps on the rear wheels?" This is a good acceptance. B merely asked for a favor that he hoped A might grant. The acceptance is not conditioned on the granting of the favor.

NEWSPAPER READERS SERVICE v. CANONSBURG POT- TERY CO.

District Court of the United States, D. Pennsylvania, 1943. 52 F.Supp. 341.

McVICAR, District Judge. This is an action to recover the sum of \$603,200 for alleged breach of a contract for the sale and delivery of goods. * * *

Plaintiff contends that Exhibit A constitutes the offer of the defendant to S. R. Taylor Company and that Exhibit B constitutes the acceptance thereof by S. R. Taylor Company. The relevant part of Exhibit A reads as follows:

"8/6/42

We will deliver to S. R. Taylor Co. two cars of dinnerware per week of sample patterns—barring all strikes or acts of God under which we have no control. To begin approx. Sept. 1st. Patterns & packaging and shipments as selected. We will deliver on this basis for a period of a year and any extension to complete contract obligations of S. R. Taylor Co.

Prices as agreed today August 6th as follows:

No. 115-A-2	108 pc. set	10.40
1608	" " "	12.36
Flora	" " "	12.36
Dorthea	" " "	13.74
1584-H or 1584-J	" " "	14.34
Moss Rose	" " "	14.17
539-H	Service Plate	5.25
" "	" " "	W/5.40

All above prices are plus packing charge.

Canonsburg Pottery Co.

W. C. George—Pres."

The relevant portion of Exhibit B, being the alleged acceptance by S. R. Taylor Company, reads as follows:

"August 6, 1942.

Canonsburg Pottery Company,
Canonsburg, Pa.

Att; W. C. George

Dear Mr. George:

This will confirm our contract made today wherein you agree to ship us a minimum of Two Carloads or equivalent, of Dinnerware per week commencing within Two weeks of date that we send you shipping instructions. This Dinnerware to be packed and shipped per our specifications.

We have already selected three patterns that we will put into operation at once. These are No. 1608—1584N and "Dorthea".

* * * * *

S. R. Taylor Co.
By S. R. Taylor".

* * * Under the terms of Exhibit A, the alleged offer, the defendant would obligate itself to "deliver to S. R. Taylor Co. two cars of dinnerware per week of sample patterns— * * * To begin approx. Sept. 1st." Under the terms of Exhibit B, defendant would be required to ship to S. R. Taylor Company a minimum of two carloads per week, "commencing within Two weeks of date that we send you shipping instructions." It will be noted that there is a material difference between the language of the offer and the language of the acceptance in regard to the dates of delivery or shipments.

The acceptance of S. R. Taylor Company stated the selection of three patterns, one of which was "1584 N." This pattern was not included in the terms of the offer.

In Iselin v. United States, 271 U.S. 136, 46 S.Ct. 458, 459, 70 L.Ed. 872, it is stated: "It is well settled that a proposal to accept, or an acceptance upon terms varying from those offered, is a rejection of the offer, and puts an end to the negotiation, unless the party who made the original offer renews it, or assents to the modification suggested."

In the American Law Institute's Restatement of the Law of Contracts, Sections 58, 59 and 60, it is stated:

"Sec. 58. Acceptance must be unequivocal in order to create a contract.

"Sec. 59. * * * an acceptance must comply exactly with the requirements of the offer, omitting nothing from the promise of performance requested.

"Sec. 60. A reply to an offer, though purporting to accept it, which adds qualifications or requires performance of conditions, is not an acceptance but is a counter-offer."

The alleged acceptance in Exhibit B was in terms which materially differed from the offer, and, therefore, it constituted either a rejection of the offer or a counter-offer. If the latter, no claim or contention is made that the counter-offer was accepted. I, therefore, conclude that Exhibits A and B do not constitute a contract between the defendant and S. R. Taylor Company. * * *

HOWARD v. MAINE INDUSTRIAL SCHOOL FOR GIRLS.

Supreme Judicial Court of Maine, 1886. 78 Me. 230, 3 A. 657.

EMERY, J. The plaintiff's declaration, briefly stated, is that he made a valid contract with the defendant corporation to furnish the mason-work and material on a new school building for \$2,400, and that the defendant prevented his going on under the contract after he had incurred expense on account thereof. From the report of the evidence we gather the following facts: The board of managers of the defendant corporation, at a meeting held June 19, 1884, voted to proceed to build a new school build-

ing, and appointed a committee of five to advertise for proposals, and to take the necessary measures for such erection. This committee, all five acting, advertised for proposals for furnishing the labor and materials required according to plans, specifications, etc. In answer to said advertisement, the following written proposal was sent in to the committee. The Howard named in the proposal was the plaintiff:

“Hallowell, September 20, 1884.

“To the Building Committee of Industrial School: We propose to put up the superstructure of said building, as per plans and specifications or instructions of your architect, E. E. Lewis, of Gardiner, Maine, for the sum of forty-five hundred and fifty-dollars.

• “John Hall, Carpenter.

“Howard & Church, Masons.”

On the same day, September 20th, the building committee had a meeting, with three members present. They opened the bids, and found the above bid to be the lowest. The record of the meeting then proceeds, as follows:

“And the contract was awarded to Hall, Howard, and Church for \$4,525. Voted that the committee require a bond from the contractors to the amount of contract, for fulfillment; also forfeiture for delay in completing the work.”

The same evening the plaintiff met Mr. Rowell, one of the building committee, and asked him, “Who got the job?” and was answered, “Hall, Howard, and Church.”

It is evident that up to this point there was no such contract between plaintiff and defendant as is stated in the declaration. The committee's advertising for bids was not an offer. They merely asked for offers. They did not agree to accept any. The first offer in the case was a joint one by Hall, Howard, and Church. Even this was not accepted unconditionally. The committee required a bond, which was never tendered by the proposers. * * *

Plaintiff nonsuit.

PETERS, C. J., WALTON, DANFORTH, LIBBEY, and FOSTER, JJ., concurred.

(B) ACCEPTANCE—TIME OF TAKING EFFECT

Unlike an offer which takes effect only when communicated, an acceptance takes effect as soon as put into process of communication by the means authorized expressly or impliedly by the offeror. This is as to bilateral contracts. As to unilateral contracts, the acceptance takes effect upon the completion by the offeree of the act called for by the offer, without notice.

An offeror may of course always expressly stipulate for actual receipt of the notice of acceptance. Where he does so, the acceptance does not take effect until communicated.

Acceptance in contracts through the mails may be completed by mailing an acceptance. The contract arises when the acceptance is mailed. In other words, the offer would speak as of the time it was received; and the acceptance as of the time it was duly mailed, which means that it must be correctly addressed and have the proper postage. The acceptance need not be received by the offeror, unless otherwise stipulated, since the contract is accepted when the letter of acceptance is mailed. By analogy to the law governing contracts by mail, it is held that a contract by telegraph may be completed by delivering a telegraphic dispatch of acceptance for transmission at the receiving office of the telegraph company. The analogy will probably prevail in the case of contracts by telephone—if the offer is made over the telephone then there is an acceptance when the offeree utters the words of acceptance into the mouthpiece at his end of the line.

The reason given for the doctrine that a contract may be completed by mailing a letter of acceptance, or by dispatching a telegraphic acceptance, is that the use of the post office or telegraph company has been authorized or indicated by the offeror as the means of communication. If the offeror himself sends the offer by mail, this of itself implies authority to answer by the same channel of communication. The same theory is applied where the offer is sent by telegram or over the phone.

LUCAS v. WESTERN UNION TELEGRAPH CO.

Supreme Court of Iowa, 1906. 131 Iowa 669, 109 N.W. 191, 6 L.R.A.,N.S., 1016.

[Action for damages occasioned by delay in transmitting a telegram. Plaintiff sought to recover profits he would have made in

an exchange of real estate, but for the negligence of the defendant in failing promptly to transmit a telegram. The telegram in question was an attempted acceptance of an offer by mail to make a certain trade in real estate, the offeror saying, "I will have to know at once." The telegram was handed to the telegraph company on the morning following the evening of the receipt of the offer by mail, and, through the negligence of the company's servants, was not delivered to the offeror until about 6 p. m. of that day. The defendant company asserted that there was no loss to the plaintiff, because plaintiff's acceptance reached the offeror in time to complete the contract, and because, further, contract was complete upon the delivery of the message of acceptance to the telegraph company. Judgment below for plaintiff.]

LADD, J. * * * Having sent the proposition by mail, he impliedly authorized its acceptance through the same agency. Such implication arises (1) when the post is used to make the offer and no other mode is suggested; and (2) when the circumstances are such that it must have been within the contemplation of the parties that the post would be used in making the answer. * * * The contract is complete in such a case when the letter containing the acceptance is properly addressed and deposited in the United States mails. * * * This is on the ground that the offeror, by depositing this letter in the post office, selects a common agency through which to conduct the negotiations, and the delivery of the letter to it is in effect a delivery to the offeror. Thereafter the acceptor has no right to the letter and cannot withdraw it from the mails. Even if he should succeed in doing so the withdrawal will not invalidate the contract previously entered into.

But plaintiff did not adopt this course. On the contrary, he chose to indicate his acceptance by transmitting a telegram to Sas by the defendant company. Sas had done nothing to indicate his willingness to adopt such agency, and the defendant in undertaking to transmit the message was acting solely as the agent of plaintiff. The latter might have withdrawn the message or stopped its delivery at any time before it actually reached Sas. It is manifest that handing the message to his own agent was not notice to the sendee of the telegram. The most formal declaration of an intention of acceptance of an offer to a third

person will not constitute a contract. A written letter or telegram, like an oral acceptance, must be communicated to the party who has made the offer or to some one expressly or impliedly authorized to receive it, and this rule is not complied with by delivering it to the writer's own agent or messenger even with direction to deliver to the offeror. * * *

The plaintiff then did not accept the offer of Sas until the telegram was received by the latter, a few minutes after 6 o'clock p.m. of the day after the letter had been received and the question arises whether this was "at once" within the meaning of the offer which stated that another deal was pending. Like "forthwith" and "immediately," "at once" does not mean instantaneously but requires action to be taken within a reasonable time [in view of the particular circumstances of the case, or,] as said in Warder, Bushnell & Glessner Co. v. Horne, 110 Iowa 285, 81 N.W. 591, it is synonymous with the words mentioned and "as soon as possible," and is "usually construed to mean within such reasonable time as shall be required under all the circumstances for doing the particular thing." It is doubtful whether the same vigilance should be exacted in the acceptance of an offer to exchange or purchase real estate as in transactions relating to the transfer of chattel property. * * * The circumstances of each case necessarily have an important bearing. There was no evidence of the time a letter, if promptly mailed, might have reached Sas. He had indicated in his letter that he was contemplating another deal, and we think ordinary minds fairly differ as to whether, in these circumstances, an acceptance 23 or 24 hours after the letter had been received was in time to bind the party making the offer, and the issue was for the jury to determine. * * *

Reversed.

POSTAL TELEGRAPH CABLE CO. v. LOUISVILLE COTTON
SEED OIL CO.

Court of Appeals of Kentucky, 1910. 140 Ky. 506, 131 S.W. 277.

CLAY, C. * * * [The facts developed on the trial are as follows: On September 11, 1905, N. K. Fairbanks & Co. made an offer to R. D. Winship, a broker in Chicago, for the purchase of ten tanks of oil at 27 cents per gallon, acceptance to be delivered

before 12 o'clock on the night of September 11th to Fairbanks & Co.] * * * At 4:16 p. m. on September 11, 1905, R. D. Winship & Co. sent the following telegram to the Louisville Cotton Oil Company, in cipher, which, when translated, reads as follows: "On firm offer can sell ten tank cars bleachable prime summer yellow oil, 27¢ Chicago, September. Answer." At 4:40 p. m. on the same day the Louisville Cotton Oil Company sent an answer in cipher, which, when translated, reads as follows: "Telegram received and offer accepted 27¢ Chicago, ten tank cars bleachable prime summer yellow oil. Memphis Exchange rules and arbitration. On receipt of this please telegraph buyer's name." This telegram was received at appellant's Chicago office at 4:55 p. m., and was sent by a messenger boy to the office of Winship & Co. Winship and his clerk left the office early in the afternoon, and no one was present when the messenger boy arrived. The boy put the telegram under the door of the office, where it was found by Winship the next morning. Winship & Co., however, had an understanding with the telegraph company that all telegrams addressed to them and received at the office of the telegraph company after Winship & Co.'s office was closed should be communicated to Winship at his residence by telephone. Numerous telegrams were received by the telegraph company on the afternoon and evening in question, and were transmitted to Winship by telephone. Winship also called up the telegraph company several times during the evening and asked for telegrams. The telegram in question was never transmitted to him or any one else connected with the firm. When the telegram was found on the morning of February 12th, the market had broken and the price of oil had declined. Fairbanks & Co. declined to confirm the purchase and receive the oil. * * *

It is the contention of appellant that, * * * according to the elementary principles of the law of contracts, the acceptance took effect when the answer of appellee was filed in the telegraph office at Louisville; that, therefore, appellee had a binding and enforceable contract, notwithstanding appellant's negligence in failing to deliver the telegram, and, consequently, was not damaged by said negligence. * * * It may * * * be conceded that, where a person makes an offer, and requires or authorizes the offeree, either expressly or impliedly, to send his answer by post or telegraph, and the answer is duly posted or telegraphed,

the acceptance is communicated and the contract is complete from the moment the letter is mailed or the telegram sent. Since agreements made by means of the post or the telegraph are simply an illustration of the general rule that the offeror takes the risk as to the effectiveness of communication, if the acceptance is made in the manner, either expressly or impliedly, indicated by him, it necessarily follows that the contract is complete as soon as the letter containing the acceptance is mailed or the telegram sent; and it makes no difference whatever that through mistake of the postoffice authorities or the telegraph company, or through accident in transmission, it is delayed or is lost in transit and never received by the offeror. 9 Cyc. 295; Carter v. Hibbard, 83 S.W. 112, 26 Ky.Law Rep. 1033; 2 Joyce on Electric Law, § 881; Jones on Telegraph and Telephone Companies, § 731.

But * * * the rule of law above referred to has no application to the facts of this case. Fairbanks & Co. had the right to attach any condition they pleased to the offer which they made to Winship & Co. Their offer to Winship was only binding in the event they were notified of its acceptance before 6 o'clock p. m. February 11th, or, at the furthest, before 12 o'clock on that night. The evidence is clear and explicit upon this point. * * * As the telegram in question was not received in time to enable Winship & Co. to accept the offer of Fairbanks & Co., and as Winship & Co. were therefore unable to make the sale pursuant to the authority contained in the telegram, it necessarily follows that appellant's negligence prevented the sale of the oil according to the terms of the offer. * * * In such a case the mere delivery of the answer to the broker's telegram at the telegraph office, giving the broker authority to sell, would not bind the intending purchaser. Actual acceptance before the time limit expires is absolutely necessary to make the sale binding. [The judgment for the plaintiff should be affirmed.]

Judgment affirmed.

(C) MISTAKES IN TRANSMISSION

If either party instead of communicating with the other party directly makes use of an intermediary who makes a mistake in the words transmitted, they nevertheless are binding on the party employing the intermediary. Where a telegraphic offer is sent and

the telegraph company transmits the message inaccurately, the offeror is treated as having made the offer in the form in which it was received by the offeree. If, however, the receiver of the telegram ought to have known that there must have been a mistake in the wording of the telegram, from his knowledge of the market, or for other reasons, he cannot by accepting, bind the offeror. And the same principle is applicable in any case where the offeree must know that the terms of the offer are unintended or misunderstood by the offeror. No contract based on an offer made under such circumstances can be enforced by the acceptor.

The law determines an offeror's intent as that which he manifests to the offeree, and not some secret intention locked up in his mind. In other words, the objective intent, not the subjective intent, is that which is taken; and only in this sense should it be understood that a "meeting of the minds" is necessary to a contract. Thus if an offer is made to sell a car at \$200, and the offeree accepts, the contract is formed; and will not be affected by the later statement of the offeror that he meant \$300. Unilateral mistake will not affect the validity of a contract.

On the other hand, if the offeror or his agent made a mistake in transmitting the offer, and the offeree knew of the mistake, or from the circumstances should have known of it, no contract will result, since there is no agreement. For example, suppose A makes B an offer to sell a carload of butter at 42 cents per pound and by mistake the telegraph company transmits the message at 24 cents a pound. So large a differential between the quoted price and the market price, in a wired offer, is sufficient to put B on inquiry as to a probable mistake in transmission; so A could not be held on the offer.

(D) SILENCE AS ACCEPTANCE

The general rule is that silence is not an acceptance of an offer. Usually a person is not under any obligation to do or say anything about a transaction which he does not desire to accept. However, silence on the part of the offeree can be an acceptance if the parties so stipulate, or if it can be implied from the facts and circumstances that there was an acceptance. In deciding whether silence is an acceptance the following situations should be taken into consideration:

A. Where a written offer is sent to the offeree in which the offeror says that there will be an acceptance if the offeror doesn't hear from the offeree, there is no implied acceptance if the offeree remains silent. The offeree is under no duty to speak in such a case and the offeror hasn't the right to force the offeree to speak.

B. Where the offeror sends goods to the offeree:

1. Where there have been previous dealings of the same nature between the parties, silence on part of the offeree is an implied acceptance.

2. If the goods are sent under a standing order and the offeree keeps them, there is an implied acceptance if the offeree remains silent.

3. Where the offeree orders goods on approval, and the offeree retains the goods beyond a reasonable time, the silent retention is an implied acceptance.

4. Where the offeror is in possession of the offeror's goods and the offeror notifies the offeree that if the goods aren't returned by a certain time then they shall be considered as sold, a failure to return them during the stipulated time is an acceptance if the offeree remains silent during that period.

5. Even though there were no previous dealings between the parties and the offeror is a stranger to the offeree, yet if the offeree knows that the offeror sent the goods with the expectation of being paid for them, then silence on the part of the offeree plus use of the goods is an implied acceptance.

6. Where goods are sent under the alternative offer to keep them and send the purchase price, or to return them immediately, silent retention beyond a reasonable time implies assent.

7. But where goods are sent to a person, accidentally or intentionally, and nothing more is present, then silence and retention is not an acceptance unless the person to whom the goods are sent exercises dominion over them. For example, if goods are delivered to A which were not ordered by him, A does not accept by merely remaining passive; but if he receives and uses them then it is held that he has accepted them.

SECTION 5.—IMPLIED CONTRACTS—OFFER AND ACCEPTANCE IMPLIED IN FACT AND IN LAW

(A) A contract implied in fact arises from acts of the parties which clearly evidence a mutual contractual intent. Implied contracts are as much true contracts as express contracts.

(B) In general, an acceptance of an offer will not be inferred from mere silence on the part of the offeree, except where there is a duty to speak.

(C) A contract implied in law is not a true contract, for the essential mutual contractual intent is absent. The law implies a promise to perform, even where there was no promise either express or implied, simply to impose a legal obligation where it should be imposed.

(A) CONTRACTS IMPLIED IN FACT

By the definition of contractual agreement, as the expression by two or more persons, either by words or conduct, of a common intention to affect legal relations, the mutual contractual intent may be evidenced not only by words, but also by conduct. Express contracts are such as arise from the words of the parties, whether written or oral, showing an intention to be bound. In many cases, however, the parties have not expressed their intention in words; but their conduct shows that intention quite as plainly. Conduct may take the place of words in the making of contracts. In such case the contract is said to be *implied in fact*; that is, implied from the facts and circumstances of the case. Sending goods in response to an order is an acceptance of the offer to buy contained in the order, an acceptance implied from the offeree's conduct. Where a person boards a street car to ride to his destination, an implied contract has been formed though no words have been spoken. So, also, if a person without permission sends goods to another, under circumstances which negative the idea of a gift, and the latter uses them, he will be liable on an implied promise to pay their reasonable value. The act of sending the goods is the offer; the conduct of the offeree in using them is the acceptance. Thus a subscriber will be liable for the

subscription price of a newspaper or magazine so long as he continues to take it from the post office, even though he has written the publisher to discontinue sending.

Every true contract is the result of an agreement; but this agreement may be inferred as a fact from the conduct of the parties as well as from what they have said or written. The most marked difference between express and implied contracts is in the method of proof. Express contracts are proved from direct evidence of what the parties said; an implied contract is proved by circumstantial evidence as to what they did.

(B) CONTRACTS IMPLIED IN LAW

Contracts implied in law are not true contracts, for they do not arise from any real agreement of the parties. They are simply legal obligations imposed by operation of law, in order to place liability where it belongs. If A steals B's watch, it can scarcely be said that he impliedly promised to pay B for it. But the law, in order to afford a remedy for the wrong, will imply the promise for him to pay A the value. Again, if a person renders beneficial services to another, reasonably expecting payment, and the person to whom the services are rendered knows it, and permits it, and accepts the benefit of those services, the law implies a promise to pay a reasonable compensation therefor.

To these contracts implied in law the name *quasi contract* has been given, in order to distinguish them from contracts implied in fact, which are true contracts since they arise out of actual agreement. On this theory one may recover money paid under mistake, or under duress or fraud, or for a consideration which has failed, or for beneficial services or materials furnished. Although an insane person manifestly cannot make a promise, yet the law will imply a promise on his part to pay out of his estate for necessities.

CHAPTER 2

CONSIDERATION

Section

1. In General.
 2. Forbearance as Consideration.
 3. Consideration—Necessity of Mutuality of Obligation.
 4. Options.
 5. Pre-existing Legal Obligation as Consideration.
 6. Part Payment of Debt as Consideration.
 7. Promissory Estoppel as Substitute for Consideration.
 8. Seal as Substitute for Consideration.
 9. Past Consideration.
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SECTION 1.—CONSIDERATION IN GENERAL

A promise, in order to be legally enforceable, must be supported by consideration. Consideration is something given in exchange for the promise—a quid pro quo. It may consist of a benefit given to the promisor, or a detriment suffered by the promisee. Benefit consists either of property or of a legal right acquired. Detriment consists either of property given up, or of a legal duty undertaken, or of a legal right relinquished.

Whether the consideration is adequate or inadequate to the value of the obligation undertaken by the promisor is not material. If there is a consideration, the courts will enforce the promise.

The second element of a binding contract is that the agreement between the parties must be supported by a valuable consideration. Any promise will create a duty to perform it; but the duty may be ethical or moral rather than legal. The law does not enforce all promises. If a person promise another to meet him at a certain place, he has undertaken a duty to be there; but the duty is not one the law will enforce, for the reason that it lacks consideration. Consideration, then, is the test of legal enforceability. There must be consideration for any promise, in order that it become a promise enforceable at law. Consideration is nearly synonymous with price or compensation. It

means something which the law esteems as of value given in exchange for the promise.

What, then, does the law esteem as of value? In the first place, all forms of property, whether any pecuniary value is connected therewith or not, will be sufficient to constitute a consideration. Thus, the conveyance of a piece of land so worthless as to be entirely without money value would nevertheless be a valuable consideration to support a promise. This is because, in addition to property, the law esteems acquired legal rights as of value. When the purchaser acquires title to land, he acquires new rights in regard to the land against other persons; and acquired rights constitute a consideration. Where A promises to pay B \$100 if he will plow his field, and B promises to plow it for the stated sum, B's promise creates a legal right in A against B; and this legal right forms the consideration for A's promise to pay the \$100. But in the case of a promise to make a gift, since nothing of value passes to the promisor in exchange for his promise, the promise is not founded upon any consideration, and so is not enforceable.

Furthermore, the thing of value given in exchange for the promise may consist not only of a benefit gained by the promisor. It may, on the other hand, be a detriment suffered by the promisee. The relinquishment of something of value by the promisee at the promisor's request will constitute a detriment. So, if A writes to B, saying, "Give C goods on credit, and I will pay for them," A will be liable on his promise, though he received no benefit, for the detriment suffered by B in parting with his goods at the request of A is a good consideration for A's promise. Also the undertaking of a *legal duty* by the promisee at the promisor's request, since it is the relinquishment of a right previously held, is a detriment, and constitutes a good consideration for a promise. Thus we may say that, when B agreed to plow the field, he undertook a legal duty, which was a detriment to him; and this legal duty is of itself a sufficient consideration to support A's promise of payment. It is in this sense of legal rights as benefit and legal duties as detriment, that the usual definition of consideration as a *benefit to the promisor, or a detriment to the promisee*, should be understood.

SECTION 2.—FORBEARANCE AS CONSIDERATION

A promise to forbear for a stated period from doing what one has a legal right to do is good consideration for a promise by the other party. It operates as a detriment to the promisee, since he has undertaken a new legal duty—to refrain from doing that which otherwise he had a right to do.

Where one agrees to forbear from doing that which he is legally entitled to do, the promise to forbear furnishes consideration to support a contract. For example, if A promises to give B \$1,000 if B promises to refrain from smoking until he reaches the age of twenty-one, B's promise is good consideration because B is giving up something he has the legal right to do. In short, the abandonment of any legal right, or a promise to forbear from exercising it, is sufficient consideration for a promise. When a creditor extends the time of payment of a debt he furnishes consideration for an additional promise by the debtor, or a third party.

Where no definite time is fixed for the period of forbearance there is no consideration, unless a promise to forbear for a reasonable time is implied, since the promisor has neither received a benefit nor has the promisee suffered any detriment where he may enforce his debt at any time. However, in some cases the facts and circumstances are such that a promise to forbear for a reasonable time can be implied. Where no fixed time for forbearance is mentioned and there has been actual forbearance for considerable time, the courts will be more prone to imply that there was a promise to forbear for a reasonable time, provided that it was clearly not intended that the one forbearing could sue at will. If he could sue at will, the mere fact that he did forbear is not sufficient consideration by another party, for nothing was given up in exchange for the other party's promise.

A promise to forbear from doing what one could not legally do is no consideration. So a promise to extend the time of payment of a gambling debt, or a promise to forbear claims under any illegal contract, furnishes no consideration by the other party, since nothing of value has been received or given up. The con-

tract upon which forbearance is based must be a legally enforceable one in order to have consideration. If the contract itself is not legally enforceable, then of course any promise made concerning it is also unenforceable.

Is a promise to forbear upon a groundless claim consideration for the other party's promise? For instance, suppose A has no cause of action against B, and A knows this. B promises to pay \$100 if A doesn't sue. Is there good consideration for B's promise? No, because one has no legal right to sue where he knows that he has no cause of action. But if A had already begun suit against B even though he knew he had a groundless claim then there is good consideration, because a promise to discontinue a suit actually begun is good consideration for a counter promise since a suit that has been commenced is presumed to be a valid one until the contrary is shown. But suppose the claim is merely a doubtful one—in other words, one that might not succeed at trial. If the claimant honestly believes he has a chance to win then his promise to forbear such a suit is sufficient consideration for a counter promise, and in such a case it makes no difference whether or not suit has already been begun. If A believes he has a valid claim against B, even though he hasn't one as a matter of law, and he threatens to sue B, B's promise to pay \$100 in exchange for A's promise to forbear suit for a definite period of time is good consideration, because one has the legal right to sue on any claim which he thinks is a valid one. In these cases the claimant must actually believe he had a just claim, even though in fact he had not. In order to determine whether the claimant honestly believed he had a cause of action, it is necessary to look into the facts and circumstances of each case. The fact that the claimant consulted an attorney as to his rights is an important factor to be taken into consideration. Did his attorney tell him he had a fair chance to win? In those cases where the claim is extremely improbable, the presumption is that the claimant did not reasonably and honestly suppose he had a good claim. Thus, where A has no cause of action and no one can reasonably believe that he has a possible cause of action, the mere fact that A honestly believes he has a cause of action is immaterial.

LATIMER v. HOLLADAY.

Supreme Court of Utah, 1943. 103 Utah 152, 134 P.2d 183.

[Defendant and plaintiff, brother and sister, were the only children of Alvaretta Holladay who on her death left the land here in question to the defendant, George T. Holladay. Thereafter, plaintiff and defendant entered into a contract by which George agreed to pay to Katherine, his sister, the sum of \$400 for any interest she might have in the said land; and Katherine agreed to release to George all right, title, and interest "she may now have, or hereafter be entitled to" in the property. The contract further provided that in the event the \$400 was not paid, the said Katherine Holladay Latimer "shall then be entitled to an undivided one-half in and to the real property".

After making certain payments defendant defaulted in the payment of further installments, and plaintiff brought this action to require defendant to convey to her a one-half interest in the property.]

WOLFE, C. J. * * * The defendant, among other defenses, set up lack or failure of consideration. This was the only defense insisted on at the trial. On appeal, defendant contends, and the trial court so held, that plaintiff had no interest in the property described in the agreement—therefore no interest to release—therefore no consideration passed.

The contract of July 12th, however, was not one for the release of any interest which the plaintiff had but for "*any* and all interest, right or title she *may now* have or *may hereafter* have in the premises." (Italics added.) If A thinking that B has an interest in a piece of property, agrees to give B \$400 to quit claim her interest if any, even against B's assertion that she has no interest, and B does deliver a quit claim deed, certainly B is entitled to recover the \$400. B's releasing of any right she *may* have in the property for A's promise to give her \$400 is a good consideration for the promise, and B having performed may recover from A.

The case for a consideration is no weaker if both A and B believe that B has an interest in the property; nor is it a case of no consideration even if A contends that B has no interest but B insists at least in good faith that she has and finally A agrees

to give her \$400 for a quit claim deed of *any* interest she *may* have.

Section 75 of the Restatement of the Law of Contracts defines a consideration for a promise as "(a) An act other than a promise (b) a forbearance, or (c) the creation, modification or destruction of a legal relation, or (d) a return promise." The act of plaintiff in releasing any interest she had or may have had in the property satisfied (a) and perhaps (c) of the above definition.

"A quit claim deed conveying such interest as the grantor may have is sufficient consideration though the grantor in fact have no interest." Williston on Contracts, Vol. 1, § 115, p. 390, Revised Edition 1936. See, also, § 137, page 482, same volume. Nix et al. v. Tooele County, 101 Utah 84, 118 P.2d 376. The case of Zion's Savings Bank & Trust Co. v. Tropic & East Fork Irr. Co., 102 Utah 101, 126 P.2d 1053, does not deal with consideration. It deals with the question as to whether the corporation actually received a *benefit* which would estop it from defending on the ground of ultra vires. For that purpose in such case it was proper to ascertain if the quit claim did actually convey an interest and bestow a benefit.

Having determined that there would have been sufficient consideration for the \$400 if a separate quit claim deed had been executed and delivered on the promise to pay the said money, we logically arrive at the inevitable position that where, in the very contract which contains the promise to pay the \$400 for a release the promisee thereupon does release and convey all her right, title and interest, she is in exactly the same position as if she had given a separate quit claim deed. * * *

LARSON, J. (concurring). I agree the trial court erred in holding the contract sued upon was void for want of consideration. I therefore concur in the order of reversing the judgment and remanding the cause to the District Court for a new trial.

AUSTIN REAL ESTATE & ABSTRACT CO. v. BAHN.

Supreme Court of Texas, 1895. 87 Tex. 582, 30 S.W. 430.

GAINES, C. J. * * * In this case, with reference to the question, the trial court found the facts as follows: "That a few days

after the note sued on became due, and just before it was assigned to the plaintiff, N. E. Fain presented same to defendant for payment, when said Stacy, as president of defendant company, requested that an extension of one week from that day be given on said note, and that the same be not placed in the hands of attorney for collection until one week, and agreed, if this was done, that he would pay the note within that time," etc. Here the creditor agrees to extend for one week, and the debtor agrees to pay within the week. He does not agree that he will not pay until the end of the week, or that in case he does pay he will pay interest for the entire period of the extension. Hence there was no consideration for the promise of the creditor. In Benson v. Phipps the principal maker of the note and the payee agreed upon an extension for 12 months, from which the promise was implied on part of the former not to sue, and upon the latter not to pay, within the stipulated time. The promise of the debtor to forego his right to pay at any time after the note was originally due secured to the creditor the absolute right to secure the interest for the entire time of the extension and constituted the consideration for the creditor's promise.

In the case before us it was the right of the company to pay at any time, notwithstanding Fain's promise, and hence there was no consideration to support that promise. The motion for a re-hearing is overruled.

SECTION 3.—CONSIDERATION—NECESSITY OF MUTUALITY OF OBLIGATION

Mutual promises are consideration for each other if they are binding promises, i. e., such promises as the law can enforce. To create legal benefit and detriment, the promises must be such as to create mutual obligations upon both promises. A promise which only seems to create an obligation, but actually does not, cannot be consideration for another promise. Such promises are called "illusory."

A promise is an illusory promise if it is so vague and uncertain as to be in practice unenforceable, or if it is in such form as to leave its performance entirely at the option of the promisor.

Although it is often said that "a promise on one side is a good consideration for a promise on another," the necessity for mutuality of obligation shows that only *binding* promises, in the sense of promises creating legal duties, are included in the rule. Therefore, it is not always that in bilateral contracts a promise on one side is consideration for a promise on the other side. For example, if A, under threat of assault at the hands of B, promises to pay B \$100 if B will promise not to assault him, there is no consideration for A's promise even though there are mutual promises on the part of the parties. B was under an obligation and duty not to assault A, therefore his promise is merely nugatory and so A is not liable to B for the \$100. Or if A promises to buy such coal as he would want to purchase from B and B promises to sell coal to A, B is not bound because A undertakes no obligation to buy, and so there is a lack of consideration.

It seems that the correct rule is that in bilateral contracts mutual promises are consideration for each other where each promise is supported by consideration that would be sufficient if it were a unilateral contract. However, even in cases where one of the parties to the contract has not expressly promised to perform or do anything it is held that there is mutuality of obligation if there is an implied promise. If A asks B what he would charge to do certain work, and B says he will charge \$100, and A says that is agreeable and that B should get to work, is there a binding bilateral contract? It seems that there is. A promise on the part of B to do the work can be easily implied as he made no objection to A's acceptance. We must not only look at what the parties said, but also at what is to be implied from what was said. It can be implied here that B promised to do the job for \$100.¹

¹ For two interesting cases illustrating this point, see *Grossman v. Schenker*, 206 N.Y. 466, 100 N.E. 39, and *Wood v. Lucy, Lady Duff-Gordon*, 222 N.Y. 88, 118 N.E. 214.

In *U. S. Potash Co. v. McNutt, C.A.N.M.*, 70 F.2d 126 (1934), a geologist's contract to accept for future services a percentage of advances that should be made for develop-

ment of the project was held supported by a good consideration, although there was no agreement to make further advances, since "mutuality was supplied when such advances were made."

But see the following case for a more logical theory of recovery where the contract is void for lack of mutuality:

BLAIR ENGINEERING CO. v. PAGE STEEL & WIRE CO.

Circuit Court of Appeals of the United States, Third Circuit, 1923. 288 F. 662.

DAVIS, Circuit Judge. * * * On February 25, 1920, complainant and defendant entered into an agreement wherein the complainant, Blair Engineering Company, agreed to furnish "all the necessary plans and specifications for such alterations and additions as the Page Steel & Wire Company may desire to make in connection with its manufacturing plant at Monessen, Pa.," and to supervise all the work involved in making the alterations and additions. For this work the defendant agreed to pay complainant "an amount equal to 10 per cent. of the work, payable in installments as follows: Ten thousand dollars at the time of signing this agreement, and an amount equal to 10 per cent. of each monthly estimate made by the Blair Engineering Company of the value of the work done by the contractor or contractors during the preceding month," within 10 days from the date of each estimate. * * *

The \$10,000 was paid on the execution of the agreement. This, together with other payments made by defendant within the next 10 months during which the complainant performed the work and expended the money on which this action is based, amounted to \$50,495.76. The complainant alleged that, immediately after the execution of the agreement, it established a force of engineers and draftsmen at Monessen, Pa., and when it had worked for 10 months, and had practically completed plans and specifications for the alterations and additions to defendant's plant, which involved an estimated cost of \$3,630,000, the defendant "failed to go forward with the construction of the said alterations and additions" to its plant, abandoned them, and directed complainant to discontinue its work on the plans and specifications. The complainant further alleged that it performed work and labor, gave services and expended money to the fair value of \$308,000, and brought its action for that amount less \$50,495.76 already paid. On motion the complaint was stricken out on the ground that the agreement was not a binding contract because it lacked mutuality and consideration, and on the further ground that complainant had been paid the sums contemplated to be paid for the services rendered. * * *

Was the contract void for lack of mutuality? Were both parties bound by the contract by definite and precise terms to do definite and specific acts? Alterations and additions to defendant's plant at Monessen, Pa., were contemplated by both parties, but was the defendant obligated under the agreement to make any "alterations and additions" of any kind whatsoever? The agreement provided that the Engineering Company should furnish necessary plans and specifications for "such alterations and additions" as the defendant company "may desire to make" in connection with its manufacturing plant. The agreement imposed no obligation whatever on the defendant to make any alterations and additions of any character. It might or it might not desire so to do. Its undertaking was conditioned by its "desire," present and future. In case it did desire to make alterations and additions, the complainant was to furnish necessary plans and specifications for them and was to be paid a specified price for the plans, specifications, and supervision of the construction in accordance with the plans and specifications. It therefore appears that there was no mutuality in the contract, for one party could not be bound to render service, unless the other is also bound to do something. *Dorsey v. Packwood*, 53 U.S. 126, 12 How. 126, 136, 13 L.Ed. 921. We are of opinion that the contract was void for lack of mutuality, and was therefore unenforceable.² * * *

² Agreements lacking mutuality of obligation, or, more accurately, mutuality of undertaking, are often classed as "illusory promises," meaning that, although on their face such promises undertake the doing of some act, actually there is no real undertaking. A promise by A to buy "such coal as he would want to purchase from B" in reality undertakes no obligation to buy, and so there is lack of consideration for B's promise to sell. *Wickham & Burton Coal Co. v. Farmers' Lumber Co.*, 189 Iowa 1183, 179 N.W. 417, 14 A.L.R. 1293 (1920). And a

contract to sell to plaintiff "such glue as he might order" was held void for want of mutuality.

But a promise to sell to defendant "all the lumber that plaintiff might cut in the next season" was held to create an obligation; for, although plaintiff might not cut any lumber, still by the promise he assumed a legal duty to sell any he might cut to defendant, and no one else, and this detriment is a consideration for defendant's promise to buy. *Ramey Lumber Co. v. John Schroeder Lumber Co.*, C.C.A.Wis., 237 F. 39 (1916).

CITY OF BOWLING GREEN v. KNIGHT.

Court of Appeals of Kentucky, 1926. 216 Ky. 838, 288 S.W. 741.

[Action on sewer construction contract by George Knight against the city of Bowling Green. Judgment for plaintiff, and defendant appeals. Affirmed.]

REES, J. On the 12th day of July, 1923, the appellee entered into a written contract with the appellant, city of Bowling Green, to construct a sewer for appellant from State street along Spring alley, the work to be done under the supervision of the city engineer, and the work to conform to the lines and grades given by the engineer, and to be done in accordance with the drawings and directions given by him from time to time, subject to such modifications and additions as might be deemed necessary during the execution of the work. * * * [It was urged on behalf of the city that:] Article 9 of the contract makes it optional with the city engineer whether appellee could continue the work after he had once begun it, and, as the contract does not bind the city to permit appellee to continue the work, it is void and unenforceable for want of mutuality.

Article 9 of the contract is as follows: "The work shall be started as soon as reasonable after the contractor receives word to commence from the engineer, and shall be rushed to completion as rapidly as is consistent with good work. If at any time the engineer decides that the work is not being pushed as it should be, he can order the contractor to relinquish his contract in part or in full, and either relet the remainder of the work or else complete it with city forces."

Where a party reserves the absolute right to cancel or terminate the contract at any time, the contract, if executory, cannot be enforced because lacking in mutuality; but that is not the case here. The city through its engineer had the right to cancel the contract only under certain conditions. The ground upon which the appellant could cancel the contract was that "the work is not being pushed as it should be," which was left to the decision of the engineer. The engineer, however, could not arbitrarily or capriciously exercise his judgment, but must have acted in good

faith and on reasonable grounds. Hence the contract was not lacking in mutuality. * * *

Judgment affirmed.³

SECTION 4.—OPTIONS

An option is a contract, whereby one party who has made an offer to sell a stated thing, agrees to hold open the offer for a stated period, in consideration of a price paid or promised to be paid by the other party.

In the case of options to purchase, there is what appears to be an obligation upon one side only. If Smith offers to sell a piece of land to Brown for a specified sum, and gives Brown a thirty-day option to purchase, during the stated time it would seem that Smith is bound, but that the offeree may choose to buy or not, as he wishes. Loosely stated, it would seem that the offeror is bound by his promise to sell, but that the offeree has taken upon himself no obligation. Such a statement of the status of the parties is inaccurate. On the one hand, Smith is not bound by any promise to sell, for he has made no such promise. His promise was to *keep open his offer* to sell, for the period of thirty days; and the consideration for this promise is the offeree's payment, or obligation to pay, the price of the option. On the other hand, it is not correct to say that the offeree has taken upon himself no obligation. On the contrary, in exchange for the promise to hold open the offer, he has promised to pay a specified sum, the price of the option. The consideration for his promise may be found either in the benefit accruing to him from the legal right to purchase at any time within the thirty days, or in the detriment suffered by the other party in incurring a legal duty to hold his offer open for the period.

³ Although it is often said that "a promise on one side is a good consideration for a promise on the other," the necessity for mutuality of obliga-

tion shows that only *binding* promises, in the sense of promises creating legal duties, are included in the rule.

SECTION 5.—PRE-EXISTING LEGAL OBLIGATION AS CONSIDERATION

The rule is that a promise to do what one is already legally bound to do is not a consideration for the promise of another, except

- (1) Where unusual and unforeseen difficulties occur in performance, and an agreement is made to pay additional compensation if the contractor will complete; and
- (2) Where the parties have mutually rescinded the original contract.

The general rule is that where one is legally obligated to do something under a contract, his new promise to perform that which he is already bound to do furnishes no consideration for another's promise. For example, if A, a professional ball player, agrees to play for \$100 a game, and before the game A refuses to play unless he receives an additional \$25, a promise to A to give him the extra compensation if he will play is not binding. Since A was already bound to play, there was no consideration for the new promise.

The weight of authority in this country is that it makes no difference whether the promise is made to A by the one with whom A originally contracted, or by a third party; with the exception, however, that where the third party has an interest in the prompt prosecution of the performance of the contract by the party who seeks the extra compensation, such undertaking on the part of the third party is binding. For example, where a subcontractor refuses to complete performance unless the owner promises to pay for his work, labor and materials, and the owner does so promise, the latter is bound. The theory on which the owner's liability is based is that the consideration for his promise consists of the creation of a right on the part of the owner to demand performance by the subcontractor.

The same result is reached if the extra compensation is promised to A if he will do his best to hit a home run. The promise is not binding as A is bound under his original contract to do his best at all times. Here too it makes no difference whether the

new promise was made to A by the party to the original contract or by a third party.

The reason for the rule that doing what one is already bound to do is no consideration for a new promise is that there is neither a legal benefit moving to the promisor nor a detriment suffered by the promisee. A person has no legal right to break a contract; on the contrary, he is under a legal duty to perform it. So where he promises anew to perform, he has given nothing in exchange for the promise to pay extra compensation; nothing, that is, that he was not already legally bound to give.

There are two exceptions to the general rule:

(1) Where unforeseen and substantial difficulties occur that were not known or reasonably to be anticipated when the contract was made, and an unanticipated additional burden is added, then a promise to that party to induce the fulfillment of the performance of his contract is binding.

(2) Where the parties have mutually rescinded the original contract. Strictly speaking, this is no exception, because if the parties rescind the former contract then there is no pre-existing obligation which will nullify the subsequent promise. It is as if the parties are contracting for the first time. However, the mere fact that a new promise is made, is insufficient to imply a rescission of the original contract. The plaintiff has the burden of proving that the prior contract was in fact rescinded. Rescission of the original contract may be express, or implied from the conduct of the parties; although the mere entering into a subsequent agreement will not be sufficient. But a cancellation of the original contract on its face, or by express language contained in the new contract, or by a demand and surrender of possession to the plaintiff of defendant's copy of the original contract, will be enough to show that the intention of the parties was a complete substitution of the new contract for the old.

Promises made to public officers to perform their duty are not binding. It is contrary to legal principle and public policy to permit a public officer or official to demand payment or reward, other than that allowed by law, for services performed in discharge of his official duty. For example, if A.'s house is robbed and A promises a policeman \$100 if he captures the criminal, and the policeman succeeds in apprehending the perpetrator of

the crime, the policeman cannot hold A for the money because it was the duty of the policeman to seek out the criminal. In other words, where a public officer only performs his duty, and nothing more, he gives no consideration for a promise to pay him for doing it. But, of course, if more than legal duty is performed by the public officer, then there is good consideration for a promise by a private party. For instance, if A's house is on fire and A's wife is trapped therein, A's offer to pay \$100 to any fireman who goes in and rescues her is binding if the act called for is performed. While a fireman is under the legal duty to fight fires, he is not under any duty to unnecessarily risk his life where to enter a building means probable death. A public officer can receive compensation for doing acts outside the requirements of his office or duty.

LINGENFELDER et al. v. WAINWRIGHT BREWING CO.

Supreme Court of Missouri, 1891. 103 Mo. 578, 15 S.W. 844.

[This was an action by P. J. Lingenfelder, executor of Edward Jungenfeld, against the Wainwright Brewery Company upon a contract for services as architect. Jungenfeld, on June 16, 1883, entered into a contract with the Wainwright Company to design the plans and make the drawings and specifications for certain brewery buildings which the company was then about to erect, and to superintend their construction to completion for a commission of 5 per cent. on the cost of the building; and defendant at the very outset of the hearing conceded that the cost of said building was \$220,406.

[It appeared from the facts that Mr. Jungenfeld was president of the Empire Refrigerating Company, and was largely interested therein. The De la Vergne Ice-Machine Company was a competitor in business. Against Mr. Jungenfeld's wishes, Mr. Wainwright awarded the contract for the refrigerating plant to be installed in the new buildings to the De la Vergne Company. The brewery was at the time in process of erection, and most of the plans were made. When Mr. Jungenfeld heard that the contract was so awarded, he took away his plans, called off his superintendent on the ground, and notified Mr. Wainwright that he would have nothing more to do with the brewery. The defend-

ant was in great haste to have its new brewery completed for divers reasons. It would be hard to find an architect to fill Mr. Jungenthal's place, and the making of new plans and arrangements when another architect was found would involve much loss of time. Under these circumstances, Mr. Wainwright promised to give Mr. Jungenthal 5 per cent. on the cost of the De la Vergne ice machine if he would resume work. Mr. Jungenthal accepted, and fulfilled the duties of superintending architect till the completion of the brewery.

[Defendant company now refuses to pay the promised 5 per cent. on the cost of the ice machine, alleging that the promise is not enforceable at law for lack of consideration.]

GANTT, P. J. * * * Was there any consideration for the promise of Wainwright to pay Jungenthal the 5 per cent. on the refrigerator plant? If there was not, plaintiffs cannot recover the \$3,449.75, the amount of that commission. The report of the referee and the evidence upon which it is based alike show that Jungenthal's claim to this extra compensation is based upon Wainwright's promise to pay him this sum to induce him, Jungenthal, to complete his original contract under its original terms. It is urged upon us by respondents that this was a new contract. New in what? Jungenthal was bound by his contract to design and supervise this building. Under the new promise he was not to do any more or anything different. What benefit was to accrue to Wainwright? He was to receive the same service from Jungenthal under the new, that Jungenthal was bound to render under the original, contract. What loss, trouble, or inconvenience could result to Jungenthal that he had not already assumed? No amount of metaphysical reasoning can change the plain fact that Jungenthal took advantage of Wainwright's necessities, and extorted the promise of 5 per cent. on the refrigerator plant as the condition of his complying with his contract already entered into. Nor was there even the flimsy pretext that Wainwright had violated any of the conditions of the contract on his part. Jungenthal himself put it upon the simple proposition that "if he, as an architect, put up the brewery, and another company put up the refrigerating machinery, it would be a detriment to the Empire Refrigerating Company," of which Jungenthal was president. To permit plaintiff to recover under such circumstances would be to offer a premium upon bad faith, and invite men to violate

their most sacred contracts that they may profit by their own wrong. "That a promise to pay a man for doing that which he is already under contract to do is without consideration" is conceded by respondents. The rule has been so long imbedded in the common law and decisions of the highest courts of the various states that nothing but the most cogent reasons ought to shake it. * * *

The learned counsel for respondents do not controvert the general proposition. Their contention is, and the circuit court agreed with them, that when Jungenfeld declined to go further on his contract, that defendant then had the right to sue for damages, and, not having elected to sue Jungenfeld, but having acceded to his demand for the additional compensation, defendant cannot now be heard to say his promise is without consideration. While it is true Jungenfeld became liable in damages for the obvious breach of his contract we do not think it follows that defendant is estopped from showing its promise was made without consideration. * * *

The case of *Bishop v. Busse*, 69 Ill. 403, is readily distinguishable from the case at bar. The price of brick increased very considerably, and the owner changed the plan of the building, so as to require nearly double the number. Owing to the increased price and change in the plans the contractor notified the party for whom he was building that he could not complete the house at the original prices, and thereupon a new arrangement was made and it is expressly upheld by the court on the ground that the change in the buildings was such a modification as necessitated a new contract. Nothing we have said is intended as denying parties the right to modify their contracts, or make new contracts, upon new or different considerations, and binding themselves thereby. What we hold is that, when a party merely does what he has already obligated himself to do, he cannot demand an additional compensation therefor, and although by taking advantage of the necessities of his adversary he obtains a promise for more, the law will regard it as nudum pactum, and will not lend its process to aid in the wrong.

So holding, we reverse the judgment of the circuit court of St. Louis to the extent that it allows the plaintiffs below (respondents here) the sum of \$3,449.75, the amount of commission at 5

per cent. on the refrigerator plant, and at the request of both sides we proceed to enter the judgment here which, in our opinion, the circuit court of St. Louis should have entered, and accordingly it is adjudged that the report of the referee be in all things approved, and that defendant have and recover of plaintiffs, as executors of Edmund Jungenfeld, the sum of \$1,492.17, so found by the referee, with interest from March 9, 1887. All the judges of this division concur.

HOFFMAN v. ST. LOUIS REFRIGERATOR & COLD STORAGE CO.

St. Louis Court of Appeals, Missouri, 1906. 120 Mo.App. 661, 97 S.W. 619.

GOODE, J. This action was to recover the amount of \$400, alleged to be due plaintiffs by the following contract: "St. Louis, Mo., May 30, 1905. Fred Hoffman & Co., 301 Benoist, St. Louis, Mo.—Gentlemen: We have this day made the following contract with your Mr. Hogan. In consideration of the payment to you of \$400, you contract and agree so to construct the sewer you are about to build in the alley between Pine and Olive and Twelfth and Thirteenth streets, running north, that it will not affect or cause to settle our conduit that at present is located in the alley, according to the tracing we have this day given to your Mr. Hogan; and you further agree that if, in constructing this sewer, you do cause us any damage, that you will pay all losses to which we are put by reason of the damage. The \$400 is to be paid to you when you have finished the sewer and the same has been accepted by the city of St. Louis. It is understood that your acceptance of this contract is on the condition that the board of public improvements shall stake out the sewer west of our conduit. If you are prepared to confirm this contract, please sign, and return to us one copy of this letter, which is issued in duplicate; you retaining the other. Yours truly, St. Louis Refrigerator & Cold Storage Co., T. S. McPheeters, President. Accepted: Fred H. Hoffman & Co. T. F. Hogan." . . .

Plaintiffs were under contract with the city of St. Louis to lay a large sewer pipe in an alley. The defendant had three conduits or pipes laid in the alley, about three feet below the surface. One

of those pipes was filled with ammonia, one with ammonia gas, and the other was a vacuum, to be used if either of the others got out of order. The pipes were employed in connection with a system of refrigeration furnished to various business establishments in the city, among others the Jefferson Hotel. Defendant's pipes carried a pressure of 125 to 185 pounds pressure, and the testimony goes to show that if they sagged it would be easy for the ammonia or ammonia gas to escape. The sewer was to be constructed 17 feet below the surface of the alley and 14 feet below defendant's pipes. * * *

The position taken by defendant's counsel is that the contract in suit is unsupported by a consideration, because it imposed no greater responsibility on plaintiffs than they were under already by virtue of their contract with the city of St. Louis. * * * In our judgment it is not true in the case at bar that plaintiffs assumed no greater responsibility and duty to defendant regarding its pipes than they had assumed in the contract with the city; and by every authority we have found, if the agreement in suit was more detrimental to plaintiffs than the agreement with the city was, or put them under a broader obligation, there was a consideration for defendant's undertaking to compensate them. Pollock, Contracts, 7th Ed., p. 185. The city contract bound plaintiffs to sustain, by timbers, chains, or otherwise, and so as to keep them from being injured, any underground pipes they might encounter while laying the sewer; and also provided that if any damage resulted to such pipes from plaintiffs' carelessness in laying the sewer, the damage might be repaired by the proper party, and the cost of repairing recovered of plaintiffs or their surety. Perhaps the city contract was so far intended for the benefit of defendant that defendant had a right of action on it against plaintiffs and their surety.

Granting that this is true, it is obvious that in such an action defendant could have recovered no more than the cost of repairing the pipes, and this only in the event that they were damaged by plaintiffs' failure to support them, or to use ordinary care in some other particular. But the contract in suit does not limit the recovery for loss suffered by defendant in consequence of a breach of it to the cost of repairing defendant's pipes, and neither does it restrict plaintiffs' liability to a failure to support the pipes, or to damage done to them by lack of care in some other respect.

The agreement with defendant bound plaintiffs to put in the sewer in such a way that it would not affect the conduits or cause them to settle, and further bound plaintiffs to make defendant whole for all loss sustained in consequence of damage to the pipes. Such damage might have entailed a greater loss than the cost of repairs, might have suspended the use of the pipes for a time, or have caused other losses of a proximate sort, all of which would have been within the indemnity provided by the contract. Nor is it material, under the present contract, that an injury resulting to defendant's pipes from laying the sewer was not due to a failure to support the pipes, or to carelessness. Plaintiffs were under liability for damage resulting to the pipes in any way, if it was a consequence of their work. If they had supported the pipes, and had used ordinary care in laying the sewer, but nevertheless the pipes had been damaged in some way, plaintiffs still would have been liable for the loss entailed on defendant; at least, if it was possible to prevent the damage. Plaintiffs' obligation under the contract in suit was not merely to use ordinary care, and to support the pipes with timbers, chains, or otherwise. It was to put in the sewer in such a manner that defendant's pipes would not be affected by the work, and to answer for any loss occurring in consequence of their being affected. Now defendant could not contract for this higher degree of protection, and then set up lack of consideration for the promise to pay for it. * * *

PARROT et al. v. MEXICAN CENT. RY. CO., LIMITED.

Supreme Judicial Court of Massachusetts, 1911.
207 Mass. 184, 93 N.E. 590, 34 L.R.A.,N.S., 261.

[A written contract was entered into between the plaintiffs and the defendant company whereby the latter agreed to pay a specified sum for the publication of a sportsman's guide to the Mexican Central Railway. Sometime later, in the city of Mexico, one McDonald, the defendant's general passenger agent, orally promised the plaintiffs that if they would go on and complete their contract for the production of this guide book, a further sum of \$3,000 would be paid them. This is a suit upon the subsequent oral agreement.]

KNOWLTON, C. J. * * * The defendant contends that there was no consideration for the promise to pay money to the plaintiffs, because they were already bound by the writing to do all that they undertook to do under the oral agreement. As a general proposition, it is settled in this commonwealth that a promise to pay one for doing that which he was under a prior legal duty to do is not binding for want of a valid consideration. *Smith v. Bartholomew*, 1 Metc., Mass., 276, 35 Am.Dec. 365; *Com. v. Johnson*, 3 Cush., Mass., 454; *Pool v. Boston*, 5 Cush., Mass., 219; *Warren v. Hodge*, 121 Mass. 106. It has often been said that the principle involved is the same that lies at the foundation of the doctrine that a promise to accept or pay a less sum in discharge of a debt for a greater amount is not binding. In connection with the general proposition see also *Cabot v. Haskins*,³ Pick., Mass., 83, 92, 93; *Tobey v. Wareham Bank*, 13 Metc., Mass., 440–449; *Lester v. Palmer*, 4 Allen, Mass., 145; *Harlow v. Putnam*, 124 Mass. 553.

A limitation of the general proposition has been established in Massachusetts, in cases where a plaintiff, having entered into a contract with the defendant to do certain work refuses to proceed with it, and the defendant, in order to secure to himself the actual performance of the work in place of a right to collect damages from the plaintiff, promises to pay him an additional sum. This limitation is not intended to affect the rule that a contract cannot be binding without a consideration; but it rests upon the doctrine that, under these circumstances, there is a new consideration for the promise. *Munroe v. Perkins*, 9 Pick., Mass., 298, 20 Am.Dec. 475; *Holmes v. Doane*, 9 Cush., Mass., 135; *Peck v. Requa*, 13 Gray, Mass., 407; *Rollins v. Marsh*, 128 Mass. 116; *Rogers v. Rogers*, 139 Mass. 440, 1 N.E. 122; *Allen, J., in Abbott v. Doane*, 163 Mass. 433–435, 40 N.E. 197, 34 L.R.A. 33, 47 Am.St.Rep. 465. In *Rollins v. Marsh*, 128 Mass. 116–120, the court said: "The parties had made a contract in writing with which the plaintiff has become dissatisfied, and which she had informed the defendant that she should not fulfill unless the terms were modified. If she had abandoned her contract, he might have made a new arrangement with some one else for the support of his ward, and enforce whatever remedy he had for the breach, against the plaintiff. Instead of this, he made a new contract with her, which operated as a rescission of the

original agreement." In such a case the new promise is given to secure the performance, in place of an action for damages for not performing, as was pointed out by this court in *Peck v. Requa*, 13 Gray, Mass., 407, 408.

This limitation in the application of the general rule to such facts is not recognized in England, nor in most of the states in this country. See *Abbott v. Doane*, 163 Mass. 433-435, 40 N.E. 197, 34 L.R.A. 33, 47 Am.St.Rep. 465; *Leake on Cont.*, 4th Eng. Ed., 434-436; *Pollock on Cont.*, 7th Eng. Ed., 184-186; *Harriman on Cont.* §§ 117-120. See also 8 *Harvard Law Review*, 27; 12 *Harvard Law Review*, 515, 521, 531; 13 *Harvard Law Review*, 319; 17 *Harvard Law Review*, 71. While it is well established in Massachusetts, the doctrine should not be extended beyond the cases to which it is applicable upon the recognized reasons that have been given for it. A majority of the court are of opinion that it is not applicable to the evidence in this case, and that the defendant is right in its contention that, upon the assumption that the parties were bound by the written contract, there was no consideration for the new promise of the defendant. * * *

KING v. DULUTH, M. & N. RY. CO.

Supreme Court of Minnesota, 1895. 61 Minn. 482, 63 N.W. 1105.

[Action by George R. King, as surviving partner of the late firm of Wolf & King, against the Duluth, Missabe & Northern Railway Company, on contract. From an order overruling a demurrer to the complaint, defendant appeals.]

START, C. J. This is an action brought by the plaintiff, as surviving partner of the firm of Wolf & King, to recover a balance claimed to be due for the construction of a portion of the defendant's line of railway.

The complaint for a first cause of action alleges, among other things, substantially, that in January, 1893, the firm of Wolf & King entered into three written contracts with the president and representative of the defendant for the grading, clearing, grubbing, and construction of the roadbed of its railway for a certain stipulated price for each of the general items of work and labor to be performed; that the firm entered upon the performance of

such contracts, but in the latter part of February, 1893, in the course of such performance, unforeseen difficulties of construction involving unexpected expenses, and such as were not anticipated by the parties to the contracts, were encountered. That the firm of Wolf & King found that by reason of such difficulties it would be impossible to complete the contracts within the time agreed upon without employing an additional and an unusual force of men and teams, and at a loss of not less than \$40,000 to them, and consequently they notified the representative of the defendant that they would be unable to go forward with the contracts, and unable to complete or prosecute the work. Thereupon such representative entered into an agreement with them modifying the written contracts, whereby he agreed that if they would "go forward and prosecute the said work of construction, and complete said contract," he would pay or cause to be paid to them an additional consideration therefor, up to the full extent of the cost of the work, so that they should not be compelled to do the work at a loss to themselves. That in consideration of such promise they agreed to forward the work rapidly, and force the same to completion, in the manner provided in the specifications for such work and referred to in such contracts. That in reliance upon the agreement modifying the former contracts, and in reliance upon such former contracts, they did prosecute and complete the work in accordance with the contracts as so modified by the oral agreement, to the satisfaction of all parties in interest. That such contracts and the oral contract modifying them were duly ratified by the defendant, and that the actual cost of such construction was not less than \$30,000 in excess of the stipulated amount provided for in the original written contracts.

It is claimed by appellant that the complainant shows no consideration for the alleged promise to pay extra compensation for the work; that it is at best simply a promise to pay the contractors an additional compensation if they would do that which they were already legally bound to do. The general rule is that a promise of a party to a contract to do, or the doing of, that which he is already under a legal obligation to do by the terms of the contract is not a valid consideration to support the promise of the other party to pay an additional compensation for such performance. * * * In other words, a promise by one party to a

subsisting contract to the opposite party to prevent a breach of the contract on his part is without consideration. * * * If the allegations of the complaint, when taken together, are in legal effect simply that the contractors, finding by the test of experience in the prosecution of the work that they had agreed to do that which involved a greater expenditure of money than they calculated upon, that they had made a losing contract, and thereupon notified the opposite party that they were unable to proceed with the work, and he promised them extra compensation if they would perform their contract, the case is within the rule stated, and the demurrer ought to have been sustained as to the first cause of action.

It is claimed, however, by the respondent, that such is not the proper construction of the complaint, and that its allegations bring the case within the rule adopted in several states, and at least approved in our own, to the effect that if one party to a contract refuses to perform his part of it unless promised some further pay or benefit than the contract provides, and such promise is made by the other party, it is supported by a valid consideration, for the making of the new promise shows a rescission of the original contract and the substitution of another. In other words, that the party, by refusing to perform his contract, thereby subjects himself to an action for damages, and the opposite party has his election to bring an action for the recovery of such damages or to accede to the demands of his adversary and make the promise; and if he does so it is a relinquishment of the original contract and the substitution of a new one. *Munroe v. Perkins*, 9 Pick, Mass., 305, 20 Am.Dec. 475; *Bryant v. Lord*, 19 Minn. 396, Gil. 342; *Moore v. Detroit Locomotive Works*, 14 Mich. 266; *Goebel v. Linn*, 47 Mich. 489, 11 N.W. 284, 41 Am. Rep. 723; *Rogers v. Rogers*, 139 Mass. 440, 1 N.E. 122.

The doctrine of these cases as it is frequently applied does not commend itself either to our judgment or our sense of justice, for where the refusal to perform and the promise to pay extra compensation for performance of the contract are one transaction, and there are no exceptional circumstances making it equitable that an increased compensation should be demanded and paid, no amount of astute reasoning can change the plain fact that the party who refuses to perform, and thereby coerces a promise from the other party to the contract to pay him an in-

creased compensation for doing that which he is legally bound to do, takes an unjustifiable advantage of the necessities of the other party. To hold, under such circumstances, that the party making the promise for extra compensation is presumed to have voluntarily elected to relinquish and abandon all of his rights under the original contract, and to substitute therefor the new or modified agreement, is to wholly disregard the natural inference to be drawn from the transaction, and invite parties to repudiate their contract obligations whenever they can gain thereby.

There can be no legal presumption that such a transaction is a voluntary rescission or modification of the original contract, for the natural inference to be drawn from it is otherwise in the absence of any equitable considerations justifying the demand for extra pay. In such a case the obvious inference is that the party so refusing to perform his contract is seeking to take advantage of the necessities of the other party to force from him a promise to pay a further sum for that which he is already legally entitled to receive. * * *

It is entirely competent for the parties to a contract to modify or to waive their rights under it, and ingraft new terms upon it, and in such a case the promise of one party is the consideration for that of the other; but where the promise to the one is simply a repetition of a subexisting legal promise there can be no consideration for the promise of the other party, and there is no warrant for inferring that the parties have voluntarily rescinded or modified their contract. But where the party refusing to complete his contract does so by reason of some unforeseen and substantial difficulties in the performance of the contract, which were not known or anticipated by the parties when the contract was entered into, and which cast upon him an additional burden not contemplated by the parties, and the opposite party promises him extra pay or benefits if he will complete his contract, and he so promises, the promise to pay is supported by a valid consideration. In such a case the natural inference arising from the transaction, if unmodified by any equitable considerations, is rebutted, and the presumption arises that by the voluntary and mutual promises of the parties their respective rights and obligations under the original contract are waived, and those of the new or modified contract substituted for them. Cases of this character form an exception to the general rule that a promise to do that

which a party is already legally bound to do is not a sufficient consideration to support a promise by the other party to the contract to give the former an additional compensation or benefit.

* * *

What unforeseen difficulties and burdens will make a party's refusal to go forward with his contract equitable, so as to take the case out of the general rule and bring it within the exception, must depend upon the facts of each particular case. They must be substantial, unforeseen, and not within the contemplation of the parties when the contract was made. * * * The cases of *Meech v. City of Buffalo*, 29 N.Y. 198, where the unforeseen difficulty in the execution of the contract was quicksand, in place of expected ordinary earth excavation, and *Michaud v. MacGregor* [decided at the present term] 61 Minn. 198, 63 N.W. 479, where the unforeseen obstacles were rocks below the surface of the lots to be excavated, which did not naturally belong there, but were placed there, by a third party, and of the existence of which both parties to the contract were ignorant when the contract was made, are illustrations of what unforeseen difficulties will take a case out of the general rule.

Do the allegations of fact contained in plaintiff's first alleged cause of action bring his case within the exception? Clearly not; for eliminating all conclusions, and considering only the facts alleged, there is nothing to make the case exceptional, other than the general statement that the season was so extraordinary that in order to do the stipulated work it would require great and unusual expense, involving a large use of powder and extra time and labor for the purpose of blasting out the frozen earth and other material which was encountered. What the character of this material was we are not told, or what the other extraordinary conditions of the ground were. The court will take judicial knowledge of the fact that frozen ground on the Missabe Range, where the work was to be performed, in the month of February, is not unusual or extraordinary. It was a matter which must have been anticipated by the parties, and taken into consideration by them when this contract was made. The most that can be claimed from the allegations of the complaint is that the contractors had made a losing bargain, and refused to complete their contract, and the defendant, by its representative, promised them that if they would go forward and complete their contract it would

pay them an additional compensation, so that the total compensation should be equal to the actual cost of the work. * * *

So much of the order appealed from as overruled the defendant's demurrer to the supposed first cause of action in the plaintiff's complaint must be reversed. * * *⁴

SECTION 6.—PART PAYMENT OF DEBT AS CONSIDERATION FOR A RELEASE

The rule is that payment of a lesser sum in satisfaction of a greater debt is no consideration for release of the debt. But where the form of the obligation is changed to one more advantageous to the creditor, the change in form is consideration for the new contract of release. And the giving up to the creditor of some article of property (in addition to the payment) forms a valid consideration for the release.

Under the rule discussed in the previous section, the simple payment of a smaller sum in satisfaction of a larger is not a good discharge of a debt, for it is doing no more than the debtor is already bound to do, and is therefore no consideration for the creditor's promise to forego the balance. This promise, or release, as it is called, being without a consideration, constitutes no bar to a subsequent suit by the creditor against the debtor to recover the remainder of the debt. If, for example, a person owes another \$1,000, and the creditor offers to take \$500 in full for the debt, promising not to sue for the balance, the payment of the \$500 will not prevent the creditor afterwards recovering the other \$500, in spite of his promise.

⁴ In accord: Linz v. Schuck, 106 Md. 220, 67 A. 286, 11 L.R.A.N.S., 789, 124 Am.St.Rep. 481, 14 Ann.Cas. 495 (1907); Osborne v. O'Reilly, 42 N.J.Eq. 467, 9 A. 209 (1887).

Where the owner orders changes in the character, location, or amount of work to be done by the contractor, and a new promise is made to

pay additional compensation, or where for any reason due to the conduct of the owner unexpected difficulty or expense is incurred, there is ample consideration for the new promise, though no express rescission of the original contract was made.

If, however, a number of creditors promise each other and the debtor to accept a part of the liquidated debt owed to them by the debtor, and the debtor agrees to pay them the agreed upon sum, the transaction is called a composition of creditors and it is binding upon all the creditors who agreed to the proceeding. For instance, if A has a number of creditors to whom he owes various amounts, and they agree with each other and with A to settle their debts for ten cents on the dollar, we have a composition of creditors and it is binding on them, although each creditor agrees to accept in settlement a sum less than is due to him. The consideration in such agreements is the promise of each creditor to forbear from insisting upon payment in full, the forbearance by the debtor to pay the assenting creditors more than their pro rata share, the work of the debtor in securing other creditors to assent to the agreement, and the part payment to the creditors by the debtor. Such agreements are also upheld on the ground of public policy. It is against public policy to allow one creditor to recover more than others when by mutual arrangement they have agreed to receive the same percentage. This is a much fairer arrangement than to let one or two large creditors receive all the assets to the detriment of the other creditors. Also it would be a fraud on other creditors agreeing to the composition to allow one of the consenting creditors to enforce his claim in full.

Although apparently unjust to refuse to give effect to a promise or release, freely and voluntarily made upon the payment of a less sum than was actually due, yet it stands upon the same principle which denies the enforcement of any promise lacking a consideration to support it. However, the courts have limited the scope of the doctrine wherever possible. As Lord Blackburn said, in *Foakes v. Beer*,⁵ while maintaining the doctrine, "that a lesser sum cannot be a satisfaction of a greater sum," "but the gift of a horse, hawk, or robe, etc., in satisfaction, is good," regardless of the amount of the debt; and also he further said "that payment and acceptance of a parcel before the day of payment [due date] of a larger sum would be a good satisfaction in regard to the circumstance of time." It has also been held that the giving of a note for a lesser sum, with a chattel mortgage to secure payment, would constitute a good consideration for the release of the whole

⁵ L.R.App.Cas. 605 (1884).

debt, for here the creditor received additional benefit in the new rights and remedies granted by the mortgage.⁶

The method used in practice to obviate the effect of the rule is for the debtor to require the creditor to sign a release of the whole debt *under seal*. Since a promise under seal requires no consideration, such a release is valid.

This doctrine that payment of a lesser sum is no consideration for a release of the whole debt applies only to cases where the debt is *liquidated*. A liquidated claim or debt is one in which the amount due is undisputed. If, on the other hand, a bona fide disagreement exists between debtor and creditor as to the amount of the debt, it is said to be *unliquidated*.

HINES v. MASSACHUSETTS MUT. LIFE INS. CO.

Court of Civil Appeals of Texas, 1943. 174 S.W.2d 94.

[Suit to recover a balance of \$1,500 due on a \$2,700 note. Defense, that after having paid \$1,200 on the note, being in default on the balance, defendant mailed a check to the Insurance Company in the amount of \$486.61, the check bearing the words "Note payment in full"; that plaintiff company endorsed and cashed the check, thus accepting this sum in full discharge of the debt. There was a judgment for plaintiff below, on an instructed verdict, and defendant appeals.]

SPEER, J. * * * The controlling question for our determination is, Did the sending of the check for \$486.61 by defendant, bearing the words, "Note payment in full", its receipt and deposit by Mr. Lynn, constitute accord and satisfaction of defendant's liability on the note, when the amount of the check did not pay any of the interest nor attorney's fees provided in the note sued on?

⁶ *Jaffray v. Davis*, 124 N.Y. 164, 26 N.E. 351, 11 L.R.A. 710 (1891). In those states in which the common-law effect of the seal has been abolished by statute, the addition of a seal to a release would not be operative to

discharge a liquidated debt by payment of a lesser sum. Chapter 353, New York Laws of 1926, for instance, abolishes the common-law effect of a seal in the state of New York.

If the transmission of the check bearing the language mentioned, its receipt and deposit by Mr. Lynn, the building manager, did constitute accord and satisfaction, the instructed verdict given was error, while upon the other hand, if, under the circumstances of this case, it did not amount to accord and satisfaction, instructed verdict was correct.

We are of the opinion the court acted properly in the premises. Our reasons for this conclusion will be given.

The rule is well settled in this state that if there is a bona fide dispute as to the correctness of an account, or the amount involved between the parties and the debtor tenders his check to the creditor upon condition that it be accepted in full payment, the creditor must either refuse to receive the check, or accept the same burdened with its attached condition. *Root & Fehl v. Murray Tool Co.*, Tex.Com.App., 26 S.W.2d 189, 75 A.L.R. 902. * * *

In *Bergman Produce Co. v. Brown*, Tex.Civ.App. 156 S.W. 1102, it was held that in order that the payment of a sum less than the entire amount due shall become accord and satisfaction of the greater liquidated sum, the party claiming the accord and satisfaction has the burden of proof to establish a bona fide controversy or dispute as to the amount owing to the creditor.

In *Baker v. Coleman Abstract Co.*, Tex.Civ.App., 248 S.W. 412, the rule is announced to the effect that part payment of an undisputed debt is an insufficient consideration for a promise to accept such payment in full of the debt, since the creditor has done no more than he was legally bound to do. In the cited case it was further held that a general manager in full charge of a corporation's business may compromise the debt of one owing the corporation, when there is a valuable consideration therefor, but absent such consideration he could not bind his principal by the release of an undisputed debt on payment of a part thereof by one liable for it all. * * *

Defendant cites us to the rule announced in 1 Tex.Jur., sect.19, p. 262, to the effect that payment of a lesser amount than the whole of an undisputed liquidated claim before maturity is sufficient consideration to sustain the promise to discharge the remainder and constitutes accord and satisfaction. As we read the authorities cited in support of the text, the announced rule is predicated upon the theory that the whole debt sought to be dis-

charged was not due. That rule will not control here because clearly the whole debt was due and had long since been so declared; there was perhaps an offer of forbearance under named conditions but these conditions were never accepted or performed by defendant, and he cannot now claim to fall within the rule announced.

The undisputed facts in the instant case show that when defendant asked Lynn, plaintiff's building manager, for a statement of the remainder of his note and Lynn wrote him that the amount was \$486.61, it was a mistake on Lynn's part. The named amount was the balance of the principal unpaid, while none of the interest or attorney's fees had been paid. Defendant testified that he knew that the amount named by Lynn did not cover the whole indebtedness. * * *

Defendant knew plaintiff had declined to make any concessions on the obligation. He said he knew when he sent the check with the words "Note payment in full" on it he owed a greater amount. There is nothing to show a dispute or controversy about the full amount owing, other than that defendant had complained at having to pay attorney's fees, but such complaint or protest did not amount to a bona fide dispute as to the amount in controversy. Kean v. Southwestern Nat. Bank, Tex.Civ.App., 50 S.W. 2d 839. * * *

There being no error shown, and upon the authorities herein cited we conclude the judgment of the trial court should be and it is hereby affirmed.

SECTION 7.—PROMISSORY ESTOPPEL AS A SUBSTITUTE FOR CONSIDERATION

A promise to make a gift is of course without consideration and so not enforceable. But where a promisor makes a promise which he expects or reasonably should expect will induce a substantial change of position by the promisee, and such change of position follows in reliance on the promise and before it is withdrawn, the courts will enforce the promise, without consideration, to avoid injustice. The most common application of the doctrine of prom-

issory estoppel are found in charitable subscriptions and promises not to plead the statute of limitations or a discharge in bankruptcy.

The theory of enforceable contracts is the idea of a bargain, as distinguished from gratuitous promises which are unenforceable. Consideration is the test by which it is determined whether a bargain was intended. However, in some cases reasons of public policy make desirable enforcement of promises to make a gift, as in the case of charitable subscriptions. In other cases, injustice can only be avoided by enforcement of the promise to make a gift, because of the substantial loss to the promisee induced by the promise. For example, in one case an uncle urged his nephew to take a trip to Europe and promised that he would reimburse the nephew for all money expended by him on the trip. In a suit on the promise the court held it to be enforceable although clearly without consideration.

In all jurisdictions by statute, suit on any debt or promise is barred after the lapse of a stated period, usually six to ten years after the cause of action accrued. Suppose a debtor induces the creditor to defer suit by promising not to plead the statute of limitations, and in reliance upon the promise the creditor postpones suit until after the statute has run. In such case the courts enforce the debtor's promise not to interpose the bar of the statute, without consideration, on the ground of promissory estoppel.

In any case in which it can be shown that the promisee in reliance on the promise changed his position by his act or forbearance to act, in substantial degree, so that only injustice will result from a refusal to enforce the promise, there is a tendency on the part of the courts to hold that the promisor is estopped to plead no consideration. Or in other words under these conditions the promise will be enforced without consideration.

It is important to note that the essence of the doctrine is change of position induced by the promise. Even in subscriptions, where reasons of public policy favor enforceability, unless there is action by the promisee induced by the promise, it will not be enforced. Suppose that A promises to give \$5,000 to a college endowment fund, there is no basis for liability. Suppose B subscribes \$1000 for a new church, and it is later decided not to build, or B withdraws his promise before any contract to

build is let. In such cases no change of position by the college or church follows or is induced by the promise to make the gift, so there is no estoppel to deny consideration.⁷

NORTHWESTERN ENGINEERING CO. v. ELLERMAN et al.

Supreme Court of South Dakota, 1943. 10 N.W.2d 879.

Action by Northwestern Engineering Company, a corporation, against A. C. Ellerman and Daniel McLain, partners, doing business under the firm name of Ellerman & McLain, to recover damages for failure of defendant to comply with contract relating to air-base construction. From an order sustaining a motion to dismiss the plaintiff's complaint on the ground of failure to state a cause of action, plaintiff appeals.

Reversed.

RUDOLPH, J. * * * The plaintiff seeks to recover damages for the failure of the defendants to comply with the terms of a certain written agreement signed by the parties, which is made a part of the complaint, described as Exhibit "A" and which is as follows:

"Exhibit 'A'

"This agreement made this 20th day of March 1942, and between the Northwestern Engineering Company, of Rapid City, South Dakota, a corporation of the State of South Dakota, hereinafter called party of the first part, and Ellerman & McLain, of Yankton, South Dakota, co-partners, hereinafter called party of the second part,

"Witnesseth: Whereas party of the first part proposes to submit a bid to the U. S. Engineer Office, Rapid City, South Dakota, for the construction of a portion of the Rapid City Air Base project, specifically Schedule 3, designated as Water Supply, Storage Facilities, Sewage Disposal System and Sewage Treatment Plant, in accordance with Invitation No. 631-42-58 issued by the U. S.

⁷ See Presbyterian Church of Albany v. Cooper, 112 N.Y. 517, 20 N.E. 352, 3 L.R.A. 468, 8 Am.St.Rep. 767; Keuka College v. Ray, 167 N.Y. 96, 60 N.E. 325; Allegheny College v. National Chautauqua County Bank of Jamestown, 246 N.Y. 369, 159 N.E. 173, 57 A.L.R. 980.

Engineer Office, Fort Peck, Montana, which bids are to be opened at Rapid City, South Dakota, at 1:00 P. M. March 21, 1942, and

"Whereas party of the second part desires to subcontract a portion of the above-mentioned Schedule 3, namely section IV-Sewer System, in the event that party of the first part submits the lowest bid and is awarded the contract for Schedule 3;

"Therefore, it is hereby agreed that in the event of the award of the above-mentioned contract to party of the first part, the party of the second part shall perform all the work involved in the construction of Schedule 3, Section IV, at the following specified unit prices: (Here appear itemized material quantities and prices, totaling \$79,098.26) * * *

"It is further agreed that party of the second part shall include in the unit prices above mentioned, and shall be held liable for all incidental expenses involved in the construction of the above work, such as paying all payrolls, paying all Workmen's Compensation insurance, Property Damage and Public Liability insurance, Social Security taxes, and any other similar items pertaining to the portion of work under contract required under the specifications of the contract.

"It is further agreed that in the event a contract for the above-mentioned work is entered into, the party of the first part shall make payment to party of the second part for the total amount of completed work at the end of each pay period in the full amounts received by the party of the first part from the U. S. War Department. * * *

Northwestern Engineering Company

By M. Adelstein President

Ellerman & McLain

By D. J. McLain Partner

By A. S. Ellerman Partner

Party of the second part

"Witnesses:

"J. L. Materi

"M. Levine"

As disclosed by the amended complaint the original agreement was modified by a writing endorsed thereon, which is as follows: "Party of the second part has requested increase of 15¢ per foot prior to opening of bids which request party of the first part agrees to consider prior to signing contract and agrees to an up-

ward revision in this contract." After setting forth the agreement and its subsequent modification the amended complaint alleges that, relying upon the agreement, the plaintiff submitted a bid to the United States Government as contemplated in the agreement and that this bid was accepted; that the defendants knew the plaintiffs were the successful bidders and thereafter they refused to carry out the terms and conditions of the agreement; that because of the refusal of the defendants to comply with the agreement the plaintiff was compelled to enter into a contract with parties other than the defendants for the performance of the work described in the agreement at a price in excess of the price contained in the agreement between the plaintiff and the defendants.

We first consider the agreement as originally entered into and seek to determine the rights of the parties thereunder without regard to the subsequent modification relating to the increase of price. It was the position of the trial court as disclosed by the written opinion filed herein and is the position of the respondents in this court that the agreement lacks mutuality. In support of this contention, respondents argue that under the terms of the agreement the plaintiff was not bound in any manner whatsoever, that is, there was no obligation upon the plaintiff to submit a bid on the airbase project; neither did the plaintiff part with anything in consideration for the promise of the defendants. Respondents' contention that the agreement lacks mutuality in reality amounts to a contention that there was no consideration given for the promise of the defendants. Williston on Contracts, Revised Edition, p. 504, states: "It is often stated, as if it were a requisite in the formation of contracts, that there must be mutuality. This form of statement is likely to cause confusion and however limited is at best an unnecessary way of stating that there must be valid consideration."

We are inclined to agree with respondents' contention and find that the agreement is without the customary elements of a valid consideration. Is this fatal to appellant's action? The pleaded facts disclose that knowing of appellant's intention and desire to place a bid on the airport project, the respondents promised to enter into a binding contract to do the specified work at a fixed price, this promise was not withdrawn, and relying upon the promise, the appellant submitted its bid to the government, as

contemplated in the agreement. Obviously it would seem unjust and unfair, after appellant was declared the successful bidder and imposed with all the obligations of such, to allow respondents to then retract their promise and permit the effect of such retraction to fall upon the appellant. Other courts have been confronted with somewhat similar situations to that which now confronts us. The result has been that there has arisen in the law a doctrine often referred to as "promissory estoppel." Williston on Contracts, Revised Edition, p. 494. While the appellant has not based its argument for a reversal upon this doctrine by name, nevertheless, we believe that the argument advanced by appellant has as its basis the principle of this doctrine. The doctrine finds expression in Section 90 of the Restatement of the Law of Contracts, as follows: "A promise which the promisor should reasonably expect to induce action or forbearance of a definite and substantial character on the part of the promisee and which does induce such action or forbearance is binding if injustice can be avoided only by enforcement of the promise."

Giving effect to this doctrine it was held that a promise was enforceable although without consideration, which was reasonably expected to and did induce a plaintiff from asserting a claim against an estate at a time when such assertion would have been effective. *Saunders Co. v. Gailbraith*, 40 OhioApp. 155, 178 N.E. 34.

There are numerous decisions in charitable subscription cases which have enforced promises because of the promisee's action in reliance thereon. See cases cited in Williston on Contracts, Revised Edition. * * *

We believe that reason and justice demand that the doctrine be applied to the present facts. We cannot believe that by accepting this doctrine as controlling in the state of facts before us we will abolish the requirement of a consideration in contract cases, in any different sense than an ordinary estoppel abolishes some legal requirement in its application. We are of the opinion, therefore, that the defendants in executing the agreement made a promise which they should have reasonably expected would induce the plaintiff to submit a bid based thereon to the Government, that such promise did induce this action, and that injustice can be avoided only by enforcement of the promise.

BEATTY'S ESTATE v. WESTERN COLLEGE OF TOLEDO,
IOWA.

Supreme Court of Illinois, 1898.
177 Ill. 280, 52 N.E. 432, 42 L.R.A. 797, 69 Am.St.Rep. 242.

[In the matter of the estate of Mary Beatty, deceased, the Western College of Toledo obtained a judgment against Jacob Miller and another, executors, and they appealed to the appellate court, which affirmed the judgment, and they again appeal].
* * *

The note, filed as a claim against the estate of the deceased, is as follows:

"\$7,000.00. Dover, Ill., Dec. 9, 1887.

"In consideration of a desire to aid the cause of Christian education, and the privilege of sending one student four years free of tuition, I promise to pay to the order of the treasurer of Western College, of Toledo, Iowa, for the erection of the Ladies' Boarding Hall of said college, on or before the first day of December, 1910, the sum of seven thousand dollars, without interest: provided, that in the event of my death before the maturity of this note it shall become then due. Mary Beatty. P. O., Dover; County, Bureau; State, Ill. Witness: H. H. Maynard, W. M. Beardshear." * * *

The appellee is a college located at Toledo, in the state of Iowa. In December, 1887, representatives of the college appealed to the deceased, Mary Beatty, at her home in Dover, Ill., for a donation of \$10,000, to complete the erection of said hall, she being a member of the denomination to which the college belonged. On December 9, 1887, she * * * gave to Maynard and Beardshear the \$7,000 note above described, and also a short-time note for \$1,000.

MAGRUDER, J. * * * It is contended, however, that the note for \$7,000, filed as a claim in this case was executed and delivered without any valid consideration to support it. * * * The proof tends to show that the note for \$7,000 was a gift or donation to the college. Such a note partakes of the nature of a voluntary subscription to raise a fund or promote an object. It is well settled that a promissory note without consideration, and

intended as a gift to the payee by the maker thereof, is but a promise to make a gift in the future, and is not enforceable. As a gift it is always revocable until it is executed, and is not executed until it is paid. "The promise stands as a mere offer, and may, by necessary consequence, be revoked at any time before it is acted upon." Pratt v. Trustees of Baptist Soc. of Elgin, 93 Ill. 475, 34 Am.Rep. 187. In Blanchard v. Williamson, 70 Ill. 647, we said (page 652): "If a party delivers his own promissory note as a gift, it is but a promise to pay a sum certain at a future day, and we are not aware such a promise can be enforced, either at law or in equity. It could not be enforced against the maker in his lifetime, and his representatives could defend against it on the ground there was no consideration." * * * But, while such a note, amounting to a mere gift, is open to the defense of a want of consideration, yet that defense cannot be made to it if money has been expended, or liabilities have been incurred, in reliance upon the note. If money has been expended, or liabilities have been incurred, which, by legal necessity, must cause loss or injury to the person so expending money or incurring liability, if the note is not paid, the donor or maker thereof is, in good conscience, bound to pay; and the gift will be upheld upon the ground of estoppel, and not by reason of any valid consideration in the original undertaking. * * *

There was evidence in the case at bar tending to show that the appellee expended money in the construction of the building known as "Ladies' Boarding Hall," upon the faith of the promise made by the deceased as embodied in the note for \$7,000. * * * In the present state of the record, we are obliged to assume that the jury found in favor of such expenditures of money and incurring of such liabilities on the part of the appellee. This being so, the appellee is entitled to its right of action, even if the note for \$7,000 was without consideration before it was thus acted upon. Upon this branch of the case, therefore, we are of the opinion that the courts below committed no error in holding the claim of appellee to be a valid claim. * * *

Judgment affirmed.

TWENTY-THIRD ST. BAPTIST CHURCH v. CORNWELL et al.

Court of Appeals of New York, 1890, 117 N.Y. 601, 23 N.E. 177, 6 L.R.A. 807.

Action by the Twenty-Third Street Baptist Church of New York against Jacob Weeks Cornwell and Charles H. Ostrander, as executors of Catherine Weeks, to recover a subscription made by a testatrix in her life-time. Judgment for defendants, and plaintiff appeals.

FINCH, J. It is an insuperable barrier to a recovery by the plaintiff that the subscription of Mrs. Weeks to the fund for the erection of a new church building was merely an executory gift, unsupported by any consideration. The doctrine settled in the recent case of *Church v. Cooper*, 112 N.Y. 517, 20 N.E. 352, is decisive upon the facts here presented. Since the subscriptions of several furnished no consideration for the promise of any one; since the decedent did not request the corporation to build a new edifice, and the church did not promise that it would; since no endeavor to obtain subscribers was occasioned by the express wish or direction of testatrix, but began and was continued irrespective of it; since these facts exclude the existence of a consideration at the date of the promise,—the plaintiff is compelled to rely, and does rely, upon one originating later. The contention is that the church corporation erected its new edifice, and incurred the large cost of its construction, in reliance upon these subscriptions, and so, in the end, if not in the beginning, a consideration arose to support the promise. That may happen where the expenditure can be said to have proceeded with the knowledge and assent of the subscribers; but here, before any expenditure was made or any work was begun, Mrs. Weeks died. Her gift was unexecuted at her death, and revoked by that event; and no after action of the church corporation could change or affect the result. Her executors could not create a new liability where none existed before, and had no authority to bind the estate by an assent to the work of construction, or to convert an invalid promise of the testatrix into an enforceable liability of her estate. The promise died when she died, and was merely a good intention, which did not survive her. This view of the case makes it needless to discuss the other questions with which the argument was largely occupied. The judgment should be affirmed, with costs. All concur.

SECTION 8.—THE SEAL AS A SUBSTITUTE FOR CONSIDERATION

At common law, a contract under seal is enforceable without consideration. A majority of states have by statute, however, either modified the common law rule, or have abolished altogether the distinction between sealed and simple contracts.

A contract under seal is a contract in writing to which the parties attach not only their signature but also their seals. The seal originally was wax, with an impression attached to the paper near the signature; but this is no longer essential. The impression may now be made on the paper itself, and may consist merely of the printed or written word "seal" after the signature.

As we have seen, a promise is a legal promise—that is, one which creates a legal right and its corresponding obligation—only it is supported by a consideration. The law does not enforce all promises; consideration is made the test or dividing line between those promises enforceable at law and those not so enforceable.

Promises under seal, however, are an exception to the rule, and are enforceable without a consideration. This is often accounted for on the ground that their solemnity imports a consideration and yet this is historically inaccurate, for the enforceability of sealed promises far antedates the beginnings of the doctrine of consideration. The sealed contract derives its validity solely from its form, and the courts refuse "to go behind the seal" into any question of consideration. The historical reason for the rule was a man's word if made under his seal became incontestable, at least by him. The modern value of the rule is that it offers the only means by which one may, if he wishes, bind himself on a promise without consideration. As we have seen a creditor might possibly desire to accept his debtor's past payment of a debt already due in full satisfaction, on the principle that a bird in the hand is worth two in the bush. Necessity for consideration would prevent validity of his release of the debtor. The means of a release under seal remedied the situation.

Many states have passed statutes altering this rule of the common law. California, Idaho, Iowa, Indiana, Kansas, Kentucky, Minnesota, Mississippi, Missouri, Montana, Nebraska, North Dakota, New York, Ohio, South Dakota, Tennessee, Utah and Wyoming have abolished all distinctions between sealed and unsealed contracts.

Since there should be some way by which a person can bind himself by a gratuitous promise, if he desires to do so, the Uniform Written Obligations Act, as adopted in Pennsylvania and with variation in New York, provides: "A written release or promise, hereafter made and signed by the person releasing or promising, shall not be invalid or enforceable for lack of consideration, if the writing also contains an additional express statement, in any form of language, that the signer intends to be legally bound."

SECTION 9.—PAST CONSIDERATION

A past consideration will not support a subsequent promise. The rule is limited in application to the situations where the "past consideration" was rendered gratuitously.

Exceptions to the rule are found in the cases where a subsequent promise is made to pay a debt barred by the statute of limitations or a bankruptcy decree.

The general rule is that a past consideration will not support a subsequent promise. A past consideration is some benefit rendered in time past, for which the person who has received the benefit at a later time promises to pay. In reality a "past consideration" is no consideration at all, since there is no benefit or detriment incurred in exchange for the promise at the time it is made. Thus, where a company, which had previously sold a steam shovel to a contractor without any warranty, afterwards promised that it was free from all defects of construction, and that, if any breakage occurred within three months, the company would make it good, it was held that the promise was not binding for lack of consideration. A familiar example of past

consideration is where a bank loans money to A upon his note, and then, before maturity, asks B to indorse the note. The promise of B to pay the note if A does not is not supported by any consideration, and B would not be liable on his indorsement. The only consideration in the case was the loaning of the money, and, since that occurred previous to the indorsement, the consideration is past.

Where past consideration was given at the request of the promisor, then it is good consideration to support a subsequent promise. For example, if A performs an act at *B's request*, and B subsequently promises to pay, it is held that B's promise is binding. Of course, if the act were merely a voluntary courtesy, or a gratuity, then the subsequent promise is not binding. On principle, it seems that if the services were not rendered under circumstances whereby the law would imply a promise to pay for their worth, then a subsequent promise would be ineffectual. If a promise can be implied from the facts and circumstances then the only effect of a subsequent promise would be as evidence of the value of the services. In many cases where a subsequent promise to pay for a previously requested act was held binding the facts show that a promise could have been implied in law anyway. Therefore, it seems that in this situation it makes no difference whether there is a subsequent promise or not.

A so-called exception to the rule that a past consideration will not support a promise is found in those cases in which a subsequent promise is made to pay a debt barred by the statute of limitations or a bankruptcy decree. But here the consideration is not in reality past, but present. The theory is that the statute or the bankruptcy decree does not extinguish the original debt, but only bars the creditors' remedy thereon; also that, since these rules of law are meant for the debtor's advantage, he may "renounce their benefit if he choose," and, if he promises to pay the debt, the promise is a waiver or renunciation of the bar of the statute or the bankruptcy, and that therefore the original debt stands forth as the consideration for the subsequent promise to pay.

Some courts enforce the promise in this class of cases on the theory of "the moral obligation created by the subsequent promise"; but this line of reasoning leads either to the principle that

moral obligation is consideration, which all courts deny, or to the proposition that these cases are an exception to the whole doctrine of consideration, an equally untenable position. It is simpler and more logical to enforce these promises on the theory that the promise waives the bar of the statute, which stands between the original debt and the subsequent promise to pay it, and, the bar being now down, the debt forms a present consideration.

CHAPTER 3

CAPACITY OF PARTIES

Section

1. In General.
 2. Infants.
 3. Corporations.
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SECTION 1.—IN GENERAL

There are four classes of persons not having full capacity to bind themselves on a contract: (1) Infants; (2) insane persons; (3) intoxicated persons; (4) corporations.

The third requisite of a contract is that the parties thereto must be competent to bind themselves upon an agreement. Thus far we have been dealing with the contract itself, ascertaining the elements essential to form an agreement, and answering the further question as to what agreements the law will enforce. Agreement by offer and acceptance, and consideration to support it, are necessary to every contract; but more than this is required. The parties must be capable of binding themselves upon a legal obligation.

Certain classes of persons the law deems incapable of entering into a binding agreement and it protects such persons against their relative inability to guard their own interests by declaring their contracts voidable at their option. These are: (1) Insane persons; (2) intoxicated persons; (3) infants.

Insane persons are incapable of entering into a binding contract. If there has already been a legal adjudication of insanity prior to the agreement, the contract is considered as void. If the party had not yet been adjudged insane, proof of actual insanity at the time will render the contract voidable, at the option of the insane person or his representatives. In the case of necessities, however, the law implies a contract on the part of the lunatic to pay their reasonable value.

A contract entered into by an intoxicated person will be declared void, upon proof that at the time of the agreement the condition was such as to render the party devoid of reason to the extent that he was ignorant of his action. A state of intoxication, such that the party was unable to judge as to his best interests merely, will not, in the absence of fraud, be sufficient to avoid the contract.

SECTION 2.—INFANTS

At common law, the age of majority was twenty-one years. By statute some states have fixed the age of majority at twenty-one for men and eighteen for women.

The contract of an infant is voidable at his option at any time before he reaches majority and for a reasonable time thereafter.

An infant is, however, liable for the reasonable value of necessities furnished at his request. The liability does not rest on his contract, but in quasi contract, for benefit received.

All persons, male and female, under the age of twenty-one years, are at common law, infants or minors. By statute in some states¹ females are of age at eighteen. The law declares the age of twenty-one as maturity for no better reason than that the line must be drawn somewhere.

Since the human being attains mental and physical maturity only by slow growth, gaining the ability to cope with others in the protection of his own interests and property only through long experience, it is necessary that the law afford some sort of protection during the years of minority. For the purpose of shielding the infant, the law declares that his contracts shall be voidable at his option. The legal effect, then, of an infant's contract, is that it is binding upon both parties until the infant, either before or after attaining his majority, avoids it. The other

¹ In Arkansas, California, Colorado, Idaho, Illinois, Iowa, Kansas, Maryland, Minnesota, Missouri, Nebraska, Nevada, North Dakota, Ohio,

Oregon, South Dakota, Vermont, and Washington, women attain their majority at 18.

party to the contract, not being himself under a disability, is bound if the infant chooses to hold him.

DISAFFIRMANCE.—An infant may, as a general rule, disaffirm any contract into which he has entered; but, until he does so, the contract may be said to exist, capable of being made absolute upon his affirmation after majority, or void by disaffirmance.

Disaffirmance may be express, or it may be implied from acts inconsistent with the existence of the contract. So, if an infant sell land or goods to A, and then later conveys title to the same property to B, this subsequent act will be deemed a disaffirmance of the first contract. The filing of suit to recover back money, paid on a contract or sale while an infant, is a disaffirmance. So, also, on an executory contract, an infant may neglect to disaffirm until sued, and then may plead his infancy as a complete defense; and such an act will amount to disaffirmance.

In order to disaffirm, the infant must render back to the other party the consideration he has received under the contract, if he still has it. But, if he has lost or spent it, nevertheless he may still disaffirm. For example, if an infant buys an automobile and later wrecks it, he may thereafter disaffirm the contract of sale and recover the money he has paid, upon tendering back the remains of the car. But, if there is nothing left of it, he may yet disaffirm and get back his money. “The infant is not required, as is an adult, to restore the opposite party to his former condition; for, if he has lost or squandered the property received by him in the transaction that he rescinds, and so is unable to restore it, he may still disaffirm the contract and recover back the consideration paid by him without making restitution; for, if it were otherwise, his privilege would be of little avail as shield against the inexperience and improvidence of youth. But, when the property received by him from the adult is in his possession, to permit him to rescind, without returning it, or offering to do so, would be to permit him to use his privilege as a sword, rather than as a shield.”²

As to the time within which an infant may disaffirm, it may be at any time during infancy, or within a reasonable time after he

² Lemmon v. Beeman, 45 Ohio St. 505, 15 N.E. 476 (1888).

comes of age. Contracts for the sale of land cannot be disaffirmed during infancy.

RATIFICATION.—Just as a person cannot make a contract by which he may be bound, during infancy, so, also, he cannot bind himself by a ratification of any such contract, until he comes of age.

Ratification, like disaffirmance, may be express, or it may be implied from conduct inconsistent with the idea of disaffirmance. Exercising acts of ownership, such as selling the property bought during infancy, or retention and beneficial use of it for a reasonable time after majority, will amount to ratification.

NECESSARIES.—An infant is, however, liable for the reasonable value of necessities furnished him. The purpose of the rule in declaring the disability of an infant is his protection; but to extend the rule to those things essential to his existence and well-being would be to change protection to deprivation. For, if he could not bind himself to pay for necessities, people might not sell them to him on other than a cash basis, and he might suffer in consequence. Therefore the law provides that an infant is bound for necessities furnished.

Here is, however, no exception to the rule that an infant's contracts are voidable at his option. The legal obligation of an infant to pay for necessities furnished is not upon any theory of contract between the parties, but from a quasi contractual relation arising by operation of law. Thus the necessities must be actually furnished, the benefit received, before any liability is incurred; and an infant cannot be liable on an *executory* contract even for necessities. Also the liability is to pay, not the agreed price, but only the reasonable value, of the necessities furnished.

Necessaries are such things as are suitable to the condition in life of the infant, and to his actual requirements at the time of delivery. So the term includes whatever is reasonably needed for the infant's subsistence, such as food and lodging; for his health, such as medicine, doctors, and nurses; for his comfort, such as clothes; and for his education. A college education is not a necessary, except under exceptional circumstances of wealth and station in society; but a common-school education,

and even a trade-school education, are deemed necessities. The question as to what are necessities can be answered only in view of the circumstances of the particular case, for it depends upon the station in life of the infant.

INFANT'S LIABILITY FOR MISREPRESENTATION.—Although an infant is not liable upon his contracts, he is liable for his torts. A tort is a legal wrong, growing out of the violation of one of the primary rights. Where an infant falsely represents that he has attained his majority, in order to induce another person to sell him goods on credit, he is guilty of the tort known as deceit. Although even under these circumstances the infant may disaffirm his contract, and may escape all liability under it, yet he will be liable in a tort action for deceit, for all damages arising out of his misrepresentation.

ILLUSTRATIONS

1. A, an infant, purchased an automobile jointly with A's father, from B. Held that A is not liable on the contract. *Wright v. Stanley Motor Co.*, 249 Ky. 20, 60 S.W.2d 144 (1933).
2. C, an infant, took his automobile to the garage of D to have it repaired. D repaired it. Held that C cannot, under the state lien statute, take the repaired car and deny liability for the repairs on the ground of infancy. *Egnaczyk v. Rowland*, 148 Misc. 889, 267 N.Y.S. 14 (1933).
3. E, an infant, bought a house and lot, lived in it for three years, and six months after he reached the age of twenty-one disaffirmed the contract. He tendered back the deed to the property and demanded back the price he paid. He may recover the price, less the reasonable value of the habitation to him.
4. G, an infant, purchased an automobile from H on the installment plan, falsely representing himself to be of legal age and with no intention of paying for the car. He kept the automobile six months and when called on to pay pleaded infancy. Held that infancy is still a good defence to an action for the contract price, but that G is liable to H for damages equal to H's loss in a tort action for fraud and deceit. *Ashlock v. Vivell*, 29 Ill.App. 388 (1888).

SECTION 3.—CORPORATIONS

Any contract of a corporation which is in excess of the powers granted expressly or impliedly by the charter is *ultra vires* and void. Where the contract is executed, so that the corporation has received the benefits, some courts allow recovery for the contract price (1) on the ground that the corporation is estopped to plead the *ultra vires* nature of the agreement; other courts allow recovery (2) for the reasonable value of the benefit received, in quasi contract. As to a public corporation, no recovery on any theory is permitted.

The capacity of a corporation to enter into binding contracts is limited to those powers expressly or impliedly granted by the state. A corporation is a creature of the law, and the limits of its contractual capacity are the powers granted to it by law. The express grant of power is to be found in the charter and in the act of incorporation under which it was organized. The implied powers are those reasonably incidental to the accomplishment of the object for which the corporation was created.

As to all acts beyond the powers expressly or impliedly granted, the corporation lacks legal capacity; that is, it lacks ability legally to bind itself. Contracts involving such acts are not enforceable. A person dealing with any corporation is chargeable with notice of the limits of its powers, and if those limits are exceeded the contract is said to be *ultra vires* and void.

To no one more than to the contractor and builder is the legal incapacity of corporate persons a matter of supreme importance. Having entered into the contract and performed his part by the completion of the building, upon his request that the corporation pay the agreed price, the contractor may be met with the defense that the contract was one beyond the powers of the corporation, and therefore *ultra vires* and void. Any stockholder may raise the objection, or, in the case of a public corporation, any citizen; and the courts will thereupon restrain the corporation from paying out the money due upon the contract.

The effect of corporate incapacity in the case of a private corporation differs from that in the case of a public corporation.

As to a private corporation, the settled law is as follows: If the *ultra vires* contract is executory on both sides, it is not enforceable by either. But, if the corporation has had the benefit of performance by the other party, some courts invoke the doctrine of equitable estoppel to prevent the corporation from pleading the defense of *ultra vires*, while other courts, which refuse this method of indirect enforcement of the contract, hold the corporation liable for the reasonable value of the benefit it has received, on the theory of quasi contract or quantum meruit.

But, in the case of a public corporation, upon a contract which is beyond its legal capacity there can be no recovery on any theory. Cities, towns, counties, incorporated villages, school districts, sanitary districts, etc., are examples of public corporations. Any contract in excess of the powers granted them by the state are void; and, furthermore, there cannot be indirect recovery on a quasi contractual theory, nor any estoppel to prevent the defense of *ultra vires*. The contractor dealing with a public corporation on any contract which the corporation lacks the capacity to make, will suffer the entire loss.

John Cassan Waite, a pioneer in the field of engineering law, has said:

"In every case in which a contractor is contemplating entering into an agreement with a corporation, he should satisfy himself first that the officers or agents acting are the proper persons to enter into the contract on behalf of the corporation, that they are acting within the limits of their powers, and that the corporation itself has the power to enter into the contract proposed. He must take notice of the lawful limits of the corporation's capacity, and ascertain whether the contract would transcend the express or implied powers granted by the charter."

"Particularly is this true in dealing with a municipal corporation, for here, if the contract is *ultra vires*, the contractor will not only be unable to recover on the contract, but he will even be precluded from getting back the value of his labor and materials on a quantum meruit, and will lose everything he has put into the structure."³

³ Waite, Engineering and Architectural Jurisprudence, p. 36.

GEORGE v. NEVADA CENT. R. CO.

Supreme Court of Nevada, 1894. 22 Nev. 228, 38 P. 441.

[Action by plaintiff, a mining engineer, upon a contract for services rendered the defendant, a railroad corporation, in investigation of certain mines in the Reese River mining district. Judgment below for defendant, and plaintiff appeals.]

BELKNAP, J. * * * Among other things it was found that the principal business of the defendant [railroad] was the transportation of ores from the Austin mining district, and that this business became unprofitable * * * because of the limited output of the mines. It appeared to some, at least, of the defendant's officers that with a more active management of the mines the traffic of the defendant would be increased. Accordingly the superintendent of the company, Mr. Hinchcliffe, by the authority of Mr. Hatch, the president, employed the plaintiff to examine the mines known as the "Manhattan mining property," and to report upon them, in the expectation that a change in their management and control could be brought about. * * *

The fact was also found that the defendant was vested with the power conferred by the statute of the state relative to railroad corporations, and that neither the president nor secretary was authorized to employ the plaintiff in the service in which he was engaged, and also that no action was ever taken by the board of directors in the matter.

Section 843, Gen. St., commits the management of corporations to a board of directors. The section is as follows: "The directors of any railroad company heretofore incorporated [under] this act * * * shall, for and on behalf of such company, * * * make and execute contracts, of whatever nature or kind, fully and completely to carry out the objects and purposes of such corporation, in such way and manner as they may think proper, and exercise generally the corporate powers of such company."

A corporation can exercise no power not granted to it by the legislature. In *Thomas v. Railroad Co.*, 101 U.S. 82, 25 L.Ed. 950, this principle was stated as follows: "We take the general doctrine to be in this country * * * that the powers of corporations organized under legislative statutes are such, and such only, as those statutes confer. Conceding the rule applicable to

all statutes, that what is fairly implied is as much granted as what is expressed, it remains that the charter of a corporation is the measure of its powers, and that the enumeration of these powers implies the exclusion of all others." In *Davis v. Railroad Co.*, 131 Mass. 259, 41 Am. Rep. 221, it is said: "A corporation has power to do such business, only, as it is authorized by its act of incorporation to do, and no other. It is not held out * * * as authorized to make contracts which are beyond the purposes and scope of its charter. It is not vested with all the capacities of a natural person, * * * but with such, only, as its charter confers. If it exceeds its chartered powers, * * * those who have subscribed to its stock may avoid any contract made by the corporation in clear excess of its powers. If it makes a contract manifestly beyond the powers conferred by its charter, and therefore unlawful, a court of chancery, on the application of a stockholder, will restrain the corporation from carrying out the contract; and a court of common law will sustain no action on the contract against the corporation. Every person who enters into a contract with a corporation is bound, at his peril, to take notice of the legal limits of its capacity." * * *

The defendant corporation is authorized by the statutes of the state to construct and maintain a railroad. [To employ persons to make reports upon mines is outside the purposes and objects of a railroad corporation, and consequently there can be no recovery upon any such contract. In this case, not only was the contract beyond the power of the corporation, but also it was beyond the powers of the agents who assumed to make it. The last must follow necessarily from the first proposition in any case; but here it is plain that only the board of directors were empowered to bind the corporation on a contract.]

It is claimed that the contract was an executed contract, and that the defendant, having received its benefits, cannot defend upon the ground of want of authority to make it. If the company had received the benefits of the contract, the question we should have to consider would be different from the one now before us. [Here the court indicates that in such case it would apply the doctrine of estoppel to prevent the company from pleading the defense of ultra vires.] But the fact is that the report never came into the possession of the corporation, as such. Several of its officers used it, but their use was unauthorized,

and never ratified by the corporation. The findings of fact on this point show "that the stockholders of said defendant did not personally know of the making of said contract, and the same was never presented to them for their action, other than said Hatch and Hinchcliffe, and no action was ever taken thereon by the board of directors of said defendant."

Judgment affirmed.⁴

LITTLER v. JAYNE et al.

Supreme Court of Illinois, 1888. 124 Ill. 123, 16 N.E. 374.

SHELDON, J. This was a bill filed by the complainant, for himself and all other taxpayers of the state, to enjoin the defendants, state house commissioners, from making, signing or approving vouchers for any expense incurred, under a certain contract therein mentioned for the making of eight electro-bronze statues of public men of the state of Illinois. [The bill was dismissed by the trial court, and the order of dismissal affirmed by the Appellate Court. The case is now before us on a writ of error sued out by the complainant.]

The grounds of the bill are, that the contract was let without advertisement for bids for the work, as required by law. * * *

[By act of the General Assembly of this state, \$531,712 was appropriated for the purpose of completing the new state house at the capital of the state, and commissioners were appointed to superintend the construction of the building.] Section 2 of said act * * * provided that all contracts for labor or materials in the erection and completion of said state house, requiring an expenditure of more than \$500, should be let to the lowest responsible bidder, * * * after advertising for bids * * * for the same, for at least thirty days, in two daily papers published in the city of Springfield and in the city of Chicago.

* * *

* The concurring opinion of Bigelow, J., is omitted.

The contract in question was made with Poulson & Eger, and is for eight copper-bronze statues, made * * * from models furnished them, each to be ten feet high, for the sum of \$7,600. The cost of the models to be furnished by the commissioners was \$2,400, making the aggregate cost of the statues \$10,000. All the advertisement there was in relation to the matter was the following, published in two daily newspapers of Springfield and Chicago [as provided by the statute, and continuing therein] for more than thirty days prior to the letting of the contract to Poulson & Eger, viz.:

"Notice to Contractors.—Sealed proposals for finishing the unfinished portions of the Illinois state house will be received by the state house commissioners, at their office in the capitol building, at Springfield, until September 1, next, * * * for the following parts of the work, viz.: For all the cut stone and granite work; for all the marble finish and floor tiling; for the iron inner dome; * * * for the plain and ornamental plastering; * * * for the plumbing and gas fitting.

"Full particulars as to the before mentioned work can be obtained at the office of the architect, W. W. Boynton, 157 La Salle Street, Chicago, where the plans and specifications can be consulted. * * * The commissioners reserve the right to reject any or all bids." * * *

This is all the evidence there is * * * that the letting of the contract for these statues was advertised as required by law. * * * There is in this no mention of statues, and evidently no sufficient notice to attract the attention of, and invite bids and proposals from, persons engaged in the business of furnishing statuary. * * * [It is not possible to regard the contract here before us as let in compliance with the statute requiring that all contracts for labor and materials shall be let after advertising for bids for the same for thirty days, since the only advertisement published contained no reference whatever to the statues which constitute the subject-matter of this contract.]

We regard this contract with Poulson & Eger for these statues as essentially a private contract made with them, and not as having been publicly let in compliance with the statute, but let contrary to its provisions, and we must hold the same, therefore, to be null and void. * * *

The judgments of the Appellate and circuit courts will be reversed, and the cause remanded to the circuit court of Sangamon county, for further proceedings in conformity with this opinion.

Judgment reversed.⁵

5 All contracts for public work, whether it be with the state, a city, town, county, incorporated village, school district, drainage or sanitary district that the contract is made, are construed strictly with reference to the capacity of the particular public corporation. Wherever the statutory authorization for public work is not literally complied with, the contract is void. No recovery can be had on the contract, and, furthermore, no recovery is available to the contractor in quasi contract, or quantum meruit, for the reasonable value of the benefit received in the shape of labor and materials, for the reason that "the law will not imply a contract which the law forbids." Thus if the statute or ordinance or charter of the public corporation letting the contract provides that contracts for public work must be let to the lowest bidder, or must be advertised for a specified time, or in a specified way, then if the contractor, even though he has completed the build-

ing, was not the lowest bidder, or if the advertisement was not published for the specified time or in the specified manner, the contract is void, and the builder may not recover the agreed price, nor even the value of the labor and materials he has put in the building.

Therefore the greatest care should be exercised wherever a contract with a public corporation is contemplated. The act or statute creating the corporation or board must be studied; the charter of the corporation must be examined to determine whether the power to make this contract is within the corporation's legal capacity. The statute limiting the city's power to incur debts is of course of supreme importance, for no recovery can be had by a contractor where that limit has been reached. Such contracts are so precarious in their nature that the best of lawyers should be consulted before any bid for public works may safely be submitted.

CHAPTER 4

LEGALITY

Section

1. In General.
 2. Contracts in Restraint of Trade.
 3. Agreements in Breach of Trust.
 4. Gambling Contracts.
 5. Agreements in Violation of Positive Law.
 6. Arbitration Agreements.
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SECTION 1.—IN GENERAL

An illegal contract is unenforceable. A contract is illegal if in violation of those rules of law which have been established as tending to promote the moral and economic welfare of the public. Laws forbidding usury, monopolies and restraint of trade, Sunday contracts, practicing professions without license, agreements not to marry, etc., are all examples of legal rules promulgated to promote public welfare.

We may have an agreement, founded upon a good consideration, and made between competent parties, yet, if its object be an illegal one, it will not be enforceable at law. To result in a contract, an agreement must create a legal obligation; and legal obligations are only such as the courts may enforce. Since an agreement having an illegal object is not enforceable at law, it never becomes a contract; and, although we speak of illegal contracts, we in reality are referring to illegal agreements, an illegal contract being an impossibility.

Nature of Illegal Agreements.—A common classification of unlawful agreements is as follows: (1) Agreements contrary to public policy; and (2) agreements in violation of statutory enactment. An undertaking to perform any act that is expressly forbidden by statute is illegal and void. Also a promise to perform an act which would be detrimental to the public in general is illegal and void, even though there be no statute to forbid it.

So a contract to commit a crime, being in violation of statutory law, is illegal. A contract not to marry is likewise illegal, not because contrary to any statute, but upon grounds of public policy. Little emphasis should be laid upon classifications, for they afford small assistance.

Sunday Contracts.—Exclusive of statute, Sunday contracts are valid. In many states, however, an agreement entered into on Sunday, or to be performed on Sunday, is by statute made illegal and void. In such states, however, an exception is made as to works of charity, necessity, or mercy. If the act be done to preserve life, health, or property, and can only be done on Sunday, it is lawful. In New York, Minnesota, and Wisconsin, it has been held that no action lies on a contract for advertising in a Sunday newspaper, performance being contemplated on Sunday.

Licensed Occupations.—Numerous statutory requirements exist in the various states as to engaging in specified occupations only where licensed to do so. Physicians and surgeons, attorneys, real estate brokers, architects, engineers, etc., are frequently required to be licensed; and a failure to comply will render illegal and unenforceable any contract for professional services entered into by such unlicensed practitioner. Any kind of agreement in violation of laws regulating trades, professions, or businesses is in general illegal and unenforceable.

Usurious Contracts.—Statutes in all states have prescribed a lawful maximum for interest rate on loans, and any agreement to pay more than the lawful rate is illegal. The usury laws differ considerably in the different states. In some, the entire contract is void, and not even the principal may be recovered by the creditor; in others, the creditor forfeits all interest; in others, the creditor may collect interest up to the legal rate.

Contracts Against Public Policy.—The above comment indicates a few only of the various types of action which the law forbids. Many acts are expressly prohibited by statute. Agreements which have for their object the performance of any of these acts are illegal and unenforceable. But there are many acts, not prohibited by statute, which, because against public policy generally, the courts declare illegal. A definition of public policy is scarcely possible. If an agreement is one which is

directed against the maintenance of public authority, against public morals, or against the economic welfare of society, it will be treated as illegal as against public policy. Some examples of such agreements are illustrated in the cases following.

Effect of Illegality.—Illegal agreements not being enforceable at law, they do not become contracts, for the reason that they do not create legal obligations. Courts will not enforce such illegal undertakings, but “will leave the parties where they are.” Being void, courts will not enforce them while executory, nor will they assist any party thereto in recovering compensation for anything he may have paid or parted with in performance thereof. The law will *“refuse its aid to either party to an illegal agreement.”*

This rule is subject to the following exceptions: (1) When the parties to the contract are not equally guilty, or (2) where it is more advantageous to public interest to allow the less guilty of the two to obtain relief, courts will assist him, so far as possible, to regain the position he occupied before the contract was made. An example of the latter exception is found in the case of *Duval v. Wellman*.¹ There plaintiff paid the defendant, a marriage broker, \$50 to find her a husband, and sued to recover back the money. The court held that the money could be recovered, in spite of the fact that the contract was void as against public policy as tending to cause ill-advised and fraudulent marriages. The purpose of the decision was the discouragement of the practice of marriage brokers by allowing recovery to the client of the fee paid, even though the client was party to the illegal contract and so in *pari delicto*.

SECTION 2.—CONTRACTS IN RESTRAINT OF TRADE

Generally speaking, agreements in restraint of trade are illegal and void, as tending to create monopolies. Where the restraining agreement is only incidental to the sale of the good will of a business, it is valid if reasonable in scope.

¹ 124 N.Y. 156, 26 N.E. 343.

The law has from early times assumed the competitive system to be the proper basis for the economic life of the people. Monopoly being the antithesis of competition, the law has always declared acts tending thereto to be against public policy. A contract in restraint of trade, since it tends to create a monopoly, is therefore illegal and void.

A limitation to this rule has, however, become universally accepted. Where the restraining agreement is only incidental to the sale of the good will of a business, it is valid, if reasonable. An agreement which has for its main object the stifling of competition is unlawful, as a general restraint of trade. But where the restraint is only a subordinate part of the contract, and is reasonably necessary to carry into effect the lawful purpose of the contract, it is valid. "It is an encouragement to industry, and to enterprise in building up a trade, that a man shall be allowed to sell the good will of his business." If the owner of a business, upon the sale thereof, could not validly bind himself not to go into the same business in the same community, he could not sell what is in fact a valuable property right, the good will of his business. Therefore contracts in partial restraint of trade are lawful, if the restraint is reasonably necessary, as to area and time, for the accomplishment of the permitted purpose.

HARRIS CALORIFIC CO. v. MARRA.

Supreme Court of Pennsylvania, 1942. 345 Pa. 464, 29 A.2d 64.

PARKER, J. The question raised by this appeal in a proceeding in equity is whether a written contract between the parties is enforceable. The court below found that the agreement constituted an illegal restraint of trade. We have come to a different conclusion.

In October, 1939, Harris Calorific Company, the plaintiff, was engaged in the manufacture and sale of welding and cutting apparatus, especially cutting and welding torches. It disposed of its product through various dealers and distributors; it employed no salesmen but it did service its products. The Welders Service Company was and had been for a considerable period a dealer or distributor of plaintiff's products in Pittsburgh and vicinity.

Daniel A. Marra was engaged in business under the name of National Torch Tip Company in Pittsburgh and vicinity. He made and sold welding and cutting tips of various kinds to be used on cutting and welding torches of all the various manufacturers, twelve or fifteen in number. Marra desired to purchase all the stock of Welders Company but wished to be assured before making the purchase that Harris Company would not take away from Welders Company the distributing rights which it held for Harris products.

Negotiations resulted in a written contract between plaintiff and defendant consummated November 3, 1939, when Marra had purchased the stock of Welders Company, the essence of which was thus expressed in the writing: "However, as a condition material of our agreeing to leave the Harris Agency with The Welders Service Co. in the event of your purchase of the latter, you distinctly and absolutely undertake and guarantee that the National Torch Tip Co., its successors and/or assigns, any representative thereof or yourself on behalf of the National Torch Tip Co. or on your own behalf, will not sell or offer for sale under any condition whatsoever, Tips manufactured by the National Torch Tip Co. which may be used with any Harris Torch whatsoever, Cutting or Welding, to any customer of The Welders Service Co. as per list hereto attached and made a part of this letter; the number of customers enumerated are—and the list has been furnished us by The Welders Service Co. as having been taken from their ledger, the names appearing on the list being customers whom they have sold at sometime in the past. To put it in another way, you will not sell to any single customer who has ever been served by The Welders Service Co. whose name appears on the attached list of their ledger accounts anything but genuine Harris parts, whether they be Tips, repair parts or whatnot." The list of customers, approximately 800, was furnished from the books of Welders Company and was approved by Marra.

The parties acted on the contract without complaint until April 11, 1940, when Marra advised Harris Company that he had sold his interest in Welders Company and that the contract was at an end. Thereafter, Marra made sales of torch tips of his own manufacture to some of the customers appearing on the list as approved by him. This bill was then filed asking for a restraining order. * * *

We are here dealing with a situation where under the admitted facts the business or trade of both parties extended beyond state lines and where the restriction if enforced would leave open to the defendant all territory in this or other countries outside a radius of approximately two hundred miles and also leave defendant free to sell his own tips to many customers even within that area. It follows that the restriction as to area is limited. Broader restrictions have frequently been held enforceable. * * *

It is now the rule in this jurisdiction as well as most others that where a contract is limited as to time or space it is not ipso facto against public policy but it is necessary to make further inquiry and determine whether the restriction is reasonable. * * *

Restatement, Contracts, § 515 states five particulars in which a restraint of trade is generally unreasonable. It is unreasonable "if it (a) is greater than is required for the protection of the person for whose benefit the restraint is imposed, or (b) imposes undue hardship upon the person restricted, or (c) tends to create, or has for its purpose to create, a monopoly, or to control prices or to limit production artificially, or (d) unreasonably restricts the alienation or use of anything that is a subject of property, or (e) is based on a promise to refrain from competition and is not ancillary either to a contract for the transfer of good-will or other subject of property or to an existing employment or contract of employment." Appellee and the court below thought this contract unreasonable in the first three respects.

The restraint imposed on Marra was not greater than was required for the protection of Harris Company. Marra, in consideration of Harris Company continuing as theretofore to allow Welders Company to be the distributor for Harris Company, covenanted that he would not sell to customers of Welders Company tips or repair parts other than genuine Harris parts. Marra, through control of Welders Company, was becoming in effect distributor for Harris and the covenant required nothing more than was customary, fair and reasonable in such transactions. It imposed upon Marra the duty of promoting the sale of Harris tips and parts rather than National Company parts. But there were additional reasons why the covenant was necessary for the protection of Harris Company. That company had adopted business expedients such as servicing its equipment; it had acquired in-

formation as to the different kinds of torch tips, more than 150 in number, which were used by the different customers and the results that had been obtained from the use of the various tips, important items in salesmanship. Marra not only received the benefit of this and other information already gathered but in his new relation would obtain like information in the future. * * *

Neither do we find any merit in the suggestion that the agreement tended to create a monopoly or control prices. The public still had access to twelve or fifteen other dealers and 150 different kinds of torch tips. Plaintiff alone had 86 different distributors of its products. Certainly a manufacturer can operate through distributors, choose his agents and prescribe how the business shall be operated without creating a monopoly. We do not find any evidence which would warrant the conclusion that these restrictions constituted a monopoly or would unreasonably affect the public adversely.

The decree is reversed at the cost of the appellee and the record is returned to the court below that an injunction may issue in harmony with this opinion.

SECTION 3.—AGREEMENTS IN BREACH OF TRUST

An agreement in breach of trust is illegal and void. Any advantage gained by the person guilty must be turned over to the trust beneficiary.

Contracts which are opposed to open and fair dealings are opposed to public policy. "A contract by which one is placed under a direct inducement to violate the confidence reposed in him by another is of this character." Wherever a person is in a position of trust and confidence towards another, any agreement the necessary effect of which is to put his interests against those of the other, which he undertakes to protect, is against public policy. Thus contracts to influence public officials, or a contract of a trustee to sell the control of funds intrusted to his care, would be illegal, for "he has no right to traffic in the confidence reposed in him."

Since a person in a position of trust and confidence to his employer owes to the latter his full loyalty, it follows that no secret profit may be made by the former at the expense of the latter. This proposition is illustrated by a California case² in which an architect, with another person, entered into a contract to construct a building, and the owners made a separate agreement with the architect contractor that he should superintend the work. When the building was done, the owners refused to pay for the superintendence. The architect sued for his money, and the owners claimed that it was illegal, as against public policy, for a person to act as contractor and superintendent at the same time, on the principle that an agent must not deal with himself, and that therefore the contract for superintendence was void. This is undoubtedly the law, and if it had not been for the fact that the architect in this instance had made full disclosure of all the facts to his owners before the several contracts were let, and that the evidence was clear on this point, the contract for superintendence would have been held null and void.

HOLCOMB v. WEAVER

Supreme Judicial Court of Massachusetts, 1884. 136 Mass. 265.

HOLMES, J. The plaintiff in New Bedford was written to from New York on behalf of the Pasque Island Club, and requested to find a builder who could erect a building for them cheaper than the New York builders. The letter continued, "but we only want parties that you can indorse in every way responsible and reliable." The plaintiff in reply introduced the defendant, who made his estimates, was employed, erected the building and was paid. At an early stage of the proceedings, the plaintiff asked and obtained a promise from the defendant to pay him \$250, "as a commission or compensation for his trouble in the matter," which is the promise sued upon. The plaintiff testified that this promise was made without the knowledge of the club, but that he expected no pay from them for procuring the defendant to erect the building. The court ruled that the plaintiff could not recover; and the plaintiff excepted.

² Shaw v. Andrews, 9 Cal. 73 (1858).

The ruling was clearly right. The plaintiff was not asked merely to introduce a possible contractor, who was to be dealt with by the club on the same footing as any one else, and to stand at no advantage in bargaining with them by reason of the introduction, as in *Rupp v. Sampson*, 16 Gray, Mass., 398, 77 Am.Dec. 416. He was asked to recommend some one as in every way responsible. His recommendation obviously was expected to have weight with the club and did have it. If his agreement with the defendant was made before his recommendation, it had a necessary tendency to give a bias to what they knew the club relied on as disinterested. A recommendation under these circumstances would have been a fraud, even if gratuitous, and it is therefore immaterial whether the club was to pay for it or not although it is hard to see why the plaintiff could not have recovered for his trouble if he had dealt fairly. If, then, the agreement was made at the time supposed, it was open to all the objections so fully stated in *Fuller v. Dame*, 18 Pick., Mass., 472, and was void by that and other Massachusetts decisions. *Rice v. Wood*, 113 Mass. 133, 18 Am.Rep. 459. See, also, *Atlee v. Fink*, 75 Mo. 100, 42 Am.Rep. 385; *Harrington v. Victoria Graving Dock Co.*, 3 Q.B.D. 549; *Panama & South Pacific Telegraph v. India Rubber, Gutta Percha & Telegraph Works*, L.R. 10 Ch. 515.

The agreement was open to the same objections on another ground, whether made before or after the plaintiff had written his recommendation. It was made at all events before the defendant had completed his bargain with the club. The parties knew that the club were seeking to get the work done as cheaply as they could get a trustworthy man to do it. If the defendant had to pay the plaintiff, he would naturally charge it to the club in his estimate, or in some way make the club pay him back. The tendency of the contract was to induce the defendant to charge, and to make the club pay, more than was necessary or fair, when the plaintiff had led them to expect that they would be dealt with honestly and economically, and certainly with no adverse interest emanating from the plaintiff.

We may add that, if the date of the promise in suit were material and left in doubt, we should assume the fact to be that which was most favorable to the ruling, and also that, if the promise was made after the plaintiff had written to New York recommending the defendant, the plaintiff would have a good

deal of difficulty in showing a consideration which was not executed before the promise was made. For the trouble for which the plaintiff was to have a commission obviously meant his recommendation of the defendant. He does not appear to have taken any other.

Judgment affirmed.

SECTION 4.—GAMBLING CONTRACTS

Most states treat gambling and wagering contracts as illegal and void when executory, but refuse to extend any remedy to the gambler whose money has passed to the winner. The usual judicial view is that, the parties being *in pari delicto* (in equal fault), no right of action accrues to either.

Wagering and gambling contracts were valid at common law. Statutes in most states, if not all, now declare all such contracts to be void, and even in the absence of statute, many courts changed the common law ruling, before the enactment of statutes, and held wagering and betting contracts illegal on the ground that they were contrary to public policy.

The most important field of gambling in which the business world is interested is that of the buying and selling of futures in grain, provisions, or stock, the parties intending no delivery of the actual property, but intending only that one party shall pay to another an amount equal to the profits that would accrue according to the state of the market at some future time. Such transactions are held by the courts to constitute mere gambling or wagering contracts, not enforceable when executory.

WAUGH v. BECK.

Supreme Court of Pennsylvania. 114 Pa. 422, 6 A. 923, 60 Am.Rep. 354.

[Action on a contract evidenced by a note. The findings of fact are that the defendant, Beck, proposed to purchase oil stock on margin, and applied to the plaintiff for a loan of the money

necessary to carry on the speculation. It does not appear that Judge Waugh was to have any share or interest in the gain that Beck might make, although he had knowledge of the use to which Beck intended to put the borrowed funds. Beck was unsuccessful in his speculations on the stock market, and now refuses to repay the money loaned, his defense to this action being that the contract was illegal and therefore void.]

MR. JUSTICE TRUNKEY delivered the opinion of the court.

In England wagers were not unlawful or unenforceable at common law, and therefore some of the decisions in that country upon wagering contracts, are inapplicable [here]. It has never been held in the highest tribunals of Pennsylvania that a wager is recoverable, and * * * the uniform current of authority [in the United States] is to the contrary. Every species of gaming contract [whether of insurance where the insured has no insurable interest, or any kind of wager], or the purchase of stock * * * without the intention to deliver or receive them, is reprobated by our law. * * *

A transaction in stocks by way of margin, settlement of differences, and payment of gain or loss, without intending to deliver the stocks, is a mere wager. * * * It is a gambling or wagering operation, which the law does not sanction and will not carry into effect. And a broker who advances money to pay losses incurred in such operations cannot recover the amount advanced, nor even his commissions for his services. * * *

The jury have found that the plaintiff furnished the money, that is, the consideration of the notes for the benefit of the defendant, but knowingly and with the purpose of furthering a gambling transaction. * * * As a general rule money loaned for the specific purpose that it shall be used by the borrower to do an act in violation of law, and has been so used, cannot be recovered back by the lender. It is not enough to defeat recovery by the lender that he knew of the borrower's intention to illegally appropriate the loan; he must know that the borrower is purposing the specific illegal use, and must be implicated [to the extent that his purpose was the furthering of the illegal use]. * * *

When the plaintiff, whilst engaged with the defendant and others in gaming and playing at cards for money, lent the defendant

a sum of money for the purpose of enabling the defendant to engage and continue in the gaming, it was held that the loan was an illegal contract, and that the money could not be recovered. The law which prohibits the end will not lend its aid in promoting the means designed to carry it into effect. * * * White v. Buss, 3 Cush., Mass., 448. * * *

[These principles are applicable not only where the acts are violative of statutes, but also where the acts are illegal solely on the ground of public policy.] * * * Where a man lends money to another for the express purpose of enabling him to commit a specific unlawful act, and such act be afterwards committed by means of the aid so received, the lender is a particeps criminis [participant in the illegal act, and cannot recover the money so loaned]. * * *

[Judgment for defendant.] ³

GRIGSBY v. RUSSELL et al.

Supreme Court of the United States, 1911.

222 U.S. 149, 32 S.Ct. 58, 56 L.Ed. 133, 36 L.R.A.,N.S., 642, Ann.Cas.1913B, 863.

[Appeal from a decree of the Circuit Court of Appeals to the effect that an assignee of an insurance policy taken out by the insured, on his own life, is not entitled to the insurance; the contract being illegal for lack of an insurable interest.]

Mr. Justice HOLMES delivered the opinion of the court.

This is a bill of interpleader brought by an insurance company to determine whether a policy of insurance issued to John C. Burchard, now deceased, upon his life, shall be paid to his administrators or to an assignee, the company having turned the

³ "That a contract of sale may be made for the future delivery of goods may not be doubted; and that such a contract, by the agreement of parties, or by the regulations of the boards of trade in the country, may be transferable from one to the other, will be conceded; but when entered into for the sole purpose of speculating in futures, and with no intention to de-

liver the cotton purchased, but to pay the difference between the contract price of the cotton and its market price on the day, if a contract in good faith, the cotton was to be delivered, then the contract becomes a mere wager, and neither party to it can recover." Beadles v. McElrath, 85 Ky. 230, 3 S.W. 152 (1887).

amount into court. The material facts are that after he had paid two premiums and a third was overdue, Burchard, being in want and needing money for a surgical operation, asked Dr. Grigsby to buy the policy, and sold it to him in consideration of \$100 and Grigsby's undertaking to pay the premiums due or to become due; and that Grigsby had no interest in the life of the assured. The Circuit Court of Appeals, in deference to some intimations of this court, held the assignment valid only to the extent of the money actually given for it and the premiums subsequently paid. * * *

Of course, the ground suggested for denying the validity of an assignment to a person having no interest in the life insured is the public policy that refuses to allow insurance to be taken out by such persons in the first place. A contract of insurance upon a life in which the insured has no interest is a pure wager that gives the insured a sinister counter interest in having the life come to an end. And although that counter interest always exists, as early was emphasized for England in the famous case of Wainewright (*Janus Weathercock*), the chance that in some cases it may prove a sufficient motive for crime is greatly enhanced if the whole world of the unscrupulous are free to bet on what life they choose. The very meaning of an insurable interest is an interest in having the life continue, and so one that is opposed to crime. And what, perhaps, is more important, the existence of such an interest makes a roughly selected class of persons who, by their general relations with the person whose life is insured, are less likely than criminals at large to attempt to compass his death.

But when the question arises upon an assignment, it is assumed that the objection to the insurance as a wager is out of the case. * * * But this being so, not only does the objection to wagers disappear, but also the principle of public policy referred to, at least, in its most convincing form. The danger that might arise from a general license to all to insure whom they like does not exist. Obviously it is a very different thing from granting such a general license, to allow the holder of a valid insurance upon his own life to transfer it to one whom he, the party most concerned, is not afraid to trust. The law has no universal cynic fear of the temptation opened by a pecuniary benefit accruing upon a death. * * * Indeed, the ground of the objection to life

insurance without interest in the earlier English cases was not the temptation to murder, but the fact that such wagers came to be regarded as a mischievous kind of gaming. * * *

On the other hand, life insurance has become in our days one of the best recognized forms of investment and self-compelled saving. So far as reasonable safety permits, it is desirable to give to life policies the ordinary characteristics of property. This is recognized by the Bankruptcy Law, § 70, 11 U.S.C.A. § 110, which provides that unless the cash surrender value of a policy like the one before us is secured to the trustee within thirty days after it has been stated, the policy shall pass to the trustee as assets. Of course the trustee may have no interest in the bankrupt's life. To deny the right to sell except to persons having such an interest is to diminish appreciably the value of the contract in the owner's hands. * * *

Decree reversed.

SECTION 5.—AGREEMENTS IN VIOLATION OF POSITIVE LAW

(1) AGREEMENT TO PERFORM A CRIMINAL ACT

Agreements which involve the doing of an act that is forbidden by law, statutory or common, or the omission to do an act which is positively enjoined by law, are illegal and void. An agreement to commit a crime or indictable offence is contrary to positive law.

STANDARD LUMBER CO. v. BUTLER ICE CO.

Circuit Court of Appeals of the United States, Third Circuit, 1906.
146 F. 359, 7 L.R.A.,N.S., 467.

GRAY, Circuit Judge. In the court below, the plaintiff in error, the Standard Lumber Company, a corporation of the state of Pennsylvania, brought an action ex contractu against the defendant, the Butler Ice Company, a corporation of the state of Delaware. The statement of claim sets forth a certain contract in writing between plaintiff and defendant, whereby the plaintiff

undertook to provide the materials and do all the work mentioned and shown in specifications and drawings, referred to in said contract, for the erection and completion of an ice plant, with certain exceptions therein stated; and in consideration thereof, the defendant agreed to pay plaintiff the sum of \$10,808. It was also agreed that there should be paid \$6.50 per perch for extra stonework, above that shown in said plans, and 50 cents per yard for extra excavating, subject to additions and deductions as in said contract provided. It is then alleged that plaintiff had provided all the materials, and had performed all the work stipulated for in said contract, in accordance with the terms thereof, and that defendant had accepted the same. * * *

The undisputed facts being that the manager of the plaintiff corporation, with the knowledge of its directing and executive authorities, entered into a corrupt bargain with the president of the defendant company, to add more than 50 per cent. to the original bid, with the understanding that the amount by which the bid was thus increased should, when paid by the defendant company, be divided between the conspirators. It is too mild a characterization of such a transaction to say that it was fraudulent. It was a gross scheme for the abstraction of more than \$4,000 from the treasury of the defendant company, to be converted to the use of the conspirators, the larger share of it to the defendant's own president. The acts and conduct thus described are clearly in violation [of a statute of Pennsylvania expressly declaring such action to be criminal]. * * *

The contract was not only immoral, but it was illegal and criminal, and therefore void. No court would be justified in enforcing the whole or any part of such a contract. From an origin so flagitious, no right of action can arise. * * *

(2) AGREEMENT TO INVADE PROPERTY RIGHTS

A contract the performance of which will operate to violate the property rights of third persons is illegal and void.

Since an infringement upon the rights of property of another is a legal wrong, it follows that any contract which provides for such an act is illegal and unenforceable.

SHORTALL et al. v. FITZSIMONS & CONNELL CO.

Appellate Court of Illinois, 1900. 93 Ill.App. 231.

MR. JUSTICE WINDES delivered the opinion of the court.

Appellants brought an action on the case against appellee, a corporation, to recover damages for an alleged breach of contract between them and appellee, whereby the latter contracted to build a protection wall, according to certain plans and specifications, near to and along the shore line of appellants' real estate, lying along and adjacent to Lake Michigan, a trial of which before the superior court and a jury resulted in a verdict for appellee, directed by the court at the close of plaintiffs' evidence, and a judgment thereon, from which this appeal is prosecuted.

The specifications show that the wall was to be "built close to the water's edge, along a line to be designated by the trustees," and the piles used in its construction were to be driven "so as to leave the heads 6 feet above the water level." The appellants seem to have acted as trustees for a syndicate. The length of the wall, as contemplated, was about 600 feet, but only 404 feet were built, which was paid for by appellants under an arrangement by which it was to be paid for as much as should be built. The line on which the wall was to be built, as located and laid out by the appellants, ran through the water of the lake about 50 feet, and, when the water was still, this line was about 10 feet from the shore line. The part of the wall built was in the water for some distance, about 80 feet, and where the water was from 6 inches to 1 foot in depth. Appellee was ordered to stop the construction of the wall, when 404 feet of it had been constructed, by the Lincoln Park Commissioners, who, under the act of the Legislature of Illinois (Hurd's Stat.1897, c. 105, par. 177, § 16), claimed to be the owner in fee, in trust for the people of Illinois, of the submerged lands under Lake Michigan at this point.

The intention of the parties to the contract cannot make their contract legal when it is in contravention of the law. If this submerged land was not owned by the Lincoln Park Commissioners, the title thereto was in the state of Illinois in trust for the public. *Revell v. People*, 177 Ill. 468-478, 52 N.E. 1052, 43 L.R.A. 790, 69 Am.St.Rep. 257, and cases cited.

We know of no well-considered case where a recovery has been allowed where the very basis of the action is an illegal contract or its breach. * * * We are of opinion that the judgment is correct, and it is affirmed.

(3) CONTRACTS IN VIOLATION OF BUILDING LAWS

A contract providing for construction of a project in a manner expressly prohibited by statute is illegal and unenforceable.

WILLIAM WILCOX MFG. CO. v. BRAZOS.

Supreme Court of Errors of Connecticut, 1901. 74 Conn. 208, 50 A. 722.

[It appears that plaintiff was the owner of a factory and water power, and that on December 25, 1895, the defendant and his three sons, who were partners, contracted to build a dam for the plaintiff company; that on April 16, 1896, shortly before the completion of the said dam, and before the plaintiff had approved and accepted it, the defendant requested payment of the balance promised for construction; that said sum was not then due, and that the defendant promised that if the plaintiff would pay the said sum immediately, and before the plaintiff inspected the dam, he (the defendant) would agree to build another dam in the same place and manner, in the event the dam already built should be carried away or destroyed by force of water within ten years from said date. Whereupon the written guaranty and agreement to rebuild was signed by the defendant, and the money paid.

It appears further that in the following year the said dam was carried away by force of water; that the plaintiff applied to the defendant to rebuild the dam in accordance with his agreement; that to said notice the defendant replied the same day in writing to the plaintiff as follows: "As I am advised your dam cannot be rebuilt according to the old plan and specifications, immediately upon receipt of plans and specifications prepared in accordance with section 3699 of the General Statutes of this state, I will submit an estimate for rebuilding your dam according to such legal plans and specifications, and make such deduction or allowance to you from the fair contract price as will be just and

reasonable on account of our former contract." That the plaintiff refused to accede to this, but insisted that defendant rebuild at his own cost in accordance with the terms of this agreement. Upon the defendant's refusal so to do, plaintiff instituted this suit; and defendant has interposed the defense of illegality.

Section 3699 of the General Statutes provides that, prior to the construction of any dams or reservoirs, the plans and specifications therefor must be submitted to the state board of civil engineers for inspection and approval; and that without the certificate of the board, no such dam or reservoir may be built or used.]

HALL, J. The only cause of action described in the complaint is the nonperformance of the defendant's written contract to rebuild the plaintiff's dam. * * * If the agreement sued upon is a contract to rebuild the original dam at the same place, in the same manner, and upon the same unapproved and insufficient plans and specifications upon which the original dam was built, it is a contract to do something expressly prohibited by statute, and is for that reason void. * * *

The fact that the defendant participated in making the illegal contract does not prevent him from pleading its illegality. Although it is the policy of the law not to interpose for the purpose of aiding either party to an illegal contract, to enforce its obligations or to obtain its benefits, yet when an action is brought upon such an agreement [either party may plead the illegality, and] the law will leave the parties where it finds them. * * *

There is no error in the record. Judgment for defendant affirmed.

(4) WHERE BY STATUTE PUBLIC WORKS MUST BE LET TO LOWEST BIDDER

In the case of public works, where a state statute provides in detail for modes of letting the contract, etc., the statute must be exactly followed. Otherwise the entire contract is illegal and void; and even though fully completed by the contractor so that the city has received the benefit, yet the illegality will be a complete defense to an action for the price.

Since any municipal corporation derives its power to contract from the state, any legislative act regulating that power must be followed to the letter, at peril of having the contract, even though it may have been fully performed by the other contracting party, declared void by the courts and all recovery thereunder denied. Suppose, for example, by state statute all contracts for public works must be let to the lowest responsible bidder after due advertisement. If a builder signs a contract directly with the city council to build a municipal building without competitive bids, even after completion he may find himself barred from recovering any part of the contract price. Any taxpayer may apply to the courts and get an order restraining the city treasurer from paying out funds of the city on this clearly illegal contract. Whenever a builder proposes to deal with any political subdivision, a town, city, drainage district, county, port authority, he should consult experienced legal advice and follow it to the letter.

SECTION 6.—ARBITRATION AGREEMENTS

An arbitration clause in a building contract is in general illegal and void as depriving the courts of jurisdiction where it is so broad as to cover the general question of liability. But if the agreement to arbitrate is limited to disputed questions of fact, it will be enforced.⁴

A limited arbitration agreement to submit questions of fact, such as the amount of damages, does not oust the jurisdiction of the court, and is valid, and no action can be maintained on the contract without proof on the part of the plaintiff that he has

⁴ This is the rule in the absence of specific statutes providing for general arbitration. In the states of Arizona, California, Connecticut, Louisiana, Massachusetts, New Hampshire, New Jersey, New York, Ohio, Oregon, Pennsylvania, Rhode Island, and Wisconsin, clauses providing for arbitration of all disputes which may arise,

including questions of fact and law, have been made valid by statutory enactment. The Federal Arbitration Law, 9 U.S.C.A. §§ 1-15, also validates arbitration agreements and general arbitration clauses in contracts and is equally broad in scope as the arbitration laws of the thirteen states listed above.

complied or at least attempted to comply with the stipulation. But where the agreement to arbitrate includes *all* disputes, it embraces also the general question of liability, which is a question of law proper only for a judicial tribunal to pass on, and such agreement is illegal and void.

The engineer or superintendent of construction is often named in building contracts as arbitrator to settle questions arising in connection with construction. Here also the agreement is valid, if the reference to the engineer includes only such questions of fact as amount or quality of the work done, or the value of extra work, etc. But an agreement to submit *all disputes* which might arise under the contract to the engineer, his decision to be final and binding on the parties, would be illegal and void.

Any stipulation in a contract that disputes as to construction or what is extra work shall be conclusively determined by one of the parties to the contract, is illegal and void; for "the law will not permit a party making a contract to provide that he shall arbitrate his own cause and that his decision shall be final and conclusive."⁵

J. T. WILLIAMS & BRO. v. BRANNING MFG. CO.

Supreme Court of North Carolina, 1911. 154 N.C. 205, 70 S.E. 290.

[Civil action for damages for breach of contract in writing, in which plaintiffs obligated for certain consideration to operate defendant's lumber plant at Ahoskie, * * * and to cut into logs the standing timber of defendant and manufacture them into lumber at said plant. * * * In the contract of 1904, the following provision is incorporated:

"Sec. 9. It is further understood and agreed in the event of any future misunderstanding or disagreement between the parties hereto, * * * that the matter shall be settled by arbitrators [in the manner herein set forth], whose award shall be accepted as final between the parties. * * *"

⁵ Board of Commissioners of Fulton County v. Gibson, 158 Ind. 471, 63 N.E. 982 (1902).

It is admitted that, disagreements having arisen, the matters in controversy were submitted to arbitration and award entered. Plaintiff, disregarding the award, sues on the contract.

So far as the parties have actually arbitrated their differences, and with respect to the matters embraced by the award, we hold that the parties are concluded by the findings of the said arbitration. It appears that the award was entered before notice was given by the plaintiff of his revocation of the arbitration agreement; therefore he is bound by it.

However, as to the disputes which have arisen in connection with the contract since the entry of the award, matters stand upon another footing. Defendant insists that the agreement to arbitrate deprives the plaintiff of the right to sue in the courts upon the contract, and confines him to the remedy by arbitration. Plaintiff contends that the said agreement to arbitrate is an illegal agreement, against public policy, in that it deprives the courts of jurisdiction.]

WALKER, J. * * * "The agreement to submit to arbitrators, not consummated by an award, is universally held to be no bar to a suit at law or equity. * * * In its very nature it must rest on the good faith and consent of the parties concerned. Parties cannot by such arrangements oust the jurisdiction of the courts or deprive themselves of the right to resort to the legal tribunals for the settlement of their controversies. After the arbitrators have acted and rendered an award, the case is very different. Their decision is binding upon the parties. * * * This distinction between a mere agreement to submit and a submission consummated by an award is universally recognized by the authorities. * * *"

"While it is well settled that an agreement * * * to submit to arbitrators the single question of the amount of loss * * * is not invalid, * * * it is equally well understood that a contract which would oust the jurisdiction of the courts by leaving all of the matters involved in any controversy * * * between insurer and insured to such arbitrament is void as against public policy. * * * There is no stipulation in this contract that no suit shall be brought until the amount of loss or damage is ascertained by arbitration, as in Manufacturing Co. v. Phoenix Assurance Co., supra [106 N.C. 28, 10 S.E.

1057], but a sweeping provision that both the liability and the loss shall be decided and settled by arbitrators. [Our conclusion is that the agreement to arbitrate as contained in this contract is illegal and void, and constitutes no bar to a suit on the contract.]

Judgment reversed.

CHAPTER 5

REALITY OF CONSENT

Section

1. In General.
 2. Mistake.
 3. Fraud.
 4. Duress.
 5. Undue Influence.
-

SECTION 1.—IN GENERAL

It is essential to every agreement that there be mutual assent. An agreement may be rendered void or voidable because the apparent assent was the result of

- (a) Mistake.
- (b) Fraud.
- (c) Duress.
- (d) Undue Influence.

The next element in the formation of a contract to be considered is the genuineness or reality of the consent of the parties, expressed in the offer and acceptance. An agreement, founded upon a good consideration, between competent parties, and for a legal object, may yet fail to be enforceable at law, if the mutual consent of the parties to be bound was given under circumstances which make it no real expression of their intention. There may be no real consent because of (1) mistake; (2) fraud; (3) duress; or (4) undue influence.

SECTION 2.—MISTAKE

(A) IN GENERAL

Mistake may be either in expression or in intention. Mistake of expression pertains to the interpretation of contracts and arises

where the parties are fully agreed as to their mutual intention, but have, through mistake in reducing their agreement to writing, failed to express therein their true intention. In such cases, the courts will reform the writing to make it conform to the true agreement.

Mistake of intention occurs where there is error as to some important fact in the subject matter of the contract. Such mistake avoids the contract in the following cases:

- (a) Mistake as to existence of the subject matter;
- (b) Mistake as to identity of the subject matter;
- (c) Mistake as to price or quality of the subject matter.

Mistake of expression may be ruled out of consideration at the start, for if the parties are actually agreed, and the mistake occurs merely in the setting out of their agreement in writing, there is no question but that a court of equity, on proof of the real agreement, will change or *reform* the written contract to conform to their true agreement. Thus, if an agreement be to sell a lot for \$1,700, and the written contract is so drawn as to express the price as \$1,300, the mistake is one of expression, and a court of equity, on clear proof of the real agreement, will change or *reform* the written contract to conform to the true intention of the parties.

Mistake of intention is not as a rule grounds for avoiding a contract, except where it is a *mutual* mistake of the parties, or a mistake of one party induced by, or known to, the other party. A person is bound by an agreement to which he has assented, even though he secretly intended something else. If he has exhibited all the outward signs of agreement, the law will hold that he has agreed. So unilateral mistake is in general no grounds for avoiding a contract.

(B) AS TO EXISTENCE OF SUBJECT MATTER

Mutual mistake as to the existence of the subject matter avoids the contract.

If the agreement is made as to a subject matter which, unknown to the parties, is not at the time in existence, the contract is void, for it was made under mutual mistake of fact. So, if A sell his cow to B, and, unknown to either party, the cow was

dead at the time of the sale, no contract results, and B may recover back from A his purchase money paid. Or where a ship at sea is sold, and it is later discovered that prior to the sale the ship had sunk, the contract is void, because of the mutual mistake of fact as to the existence of the subject matter.

(C) AS TO IDENTITY OF SUBJECT MATTER

Mutual mistake as to the identity of the subject matter avoids the contract, provided the description is such as is susceptible of two different explanations.

Where the contract relates to a thing of a certain name or description, and one of the parties thinks he is contracting for one thing that answers the description, while the other party thinks it is something else which also answers the description, no contract can result, for there is no real agreement. So if A agrees to sell to B "the cargo to arrive on the ship Burma," and there are two ships by that name, A having in mind one and B the other, obviously there has been no agreement.

However, it is only where the description of the subject matter is susceptible of two different explanations, that there can be a mutual mistake. So in the above case, if the buyer had meant a ship of a different name, he would be bound by the contract, for all he could show then would be that he meant something different than what he said; and this can be of no avail, for a unilateral mistake of fact is not ground for avoiding a contract.

KYLE v. KAVANAGH.

Supreme Judicial Court of Massachusetts, 1869. 103 Mass. 356, 4 Am. Rep. 560.

[Action on a contract to recover the price of land sold to the defendant. The evidence showed a contract whereby the defendant agreed to purchase from the plaintiff four lots of land in the town of Waltham on Prospect street. Subsequently a deed was delivered conveying certain land on Prospect street in Waltham. The defendant contended, and introduced evidence to show, that the land conveyed by the plaintiff was not the land he had bar-

gained for, and that what he had agreed to purchase was a lot of land on another Prospect street in Waltham, in no way connected with that mentioned in the deed, and a long way off.

The judge instructed the jury that, "if the defendant was negotiating for one thing and the plaintiff was selling another thing, and if their minds did not agree as to subject matter of the sale, they could not be said to have agreed and to have made a contract," and "if the plaintiff or the defendant were in fact mistaken as to the location of the land, it was a good defense, although there was no fraud or misrepresentation on the part of the plaintiff, for mistake alone, if proved, was a good defense." The jury returned a verdict for the defendant, and plaintiff took exceptions to the charge.]

MORTON, J. * * * The * * * exception taken by the plaintiff cannot be sustained. The instructions given were, in substance, that, if the defendant was negotiating for one thing and the plaintiff was selling another thing, and their minds did not agree as to the subject matter of the sale, there would be no contract by which the defendant would be bound, though there was no fraud on the part of the plaintiff. This ruling is in accordance with the elementary principles of the law of contracts, and was correct. * * *

[Exceptions overruled.]

(D) AS TO PRICE

A mistake by one party as to price, the mistake not being known nor induced by the other, will not avoid the contract. But where both parties are mistaken, there is no real agreement, and so no contract.

In offers communicated by letter or telegraph, if the offeror mistakenly quotes his price at less than he intends, or if the telegraph company makes a similar error in transmitting his message, the mistake is only unilateral, and the offeror is bound on the offer as actually made. On the other hand if the offeror names one price, and the offeree reasonably understands him to be naming another, the mistake is mutual and no contract results.

Ex Parte PERUSINI CONSTRUCTION CO.

Supreme Court of Alabama, 1942. 242 Ala. 632, 7 So.2d 576.

(Petition in equity to have a contract declared void for mistake. Petitioner was defendant in the action at law on the contract.)

LIVINGSTON, J. * * * In substance the complaint alleges that in answer to an advertisement for bids the defendant submitted its bid to perform certain work to the Shelby County Board of Education; that defendant's bid was the lowest submitted and the contract was awarded to petitioner on December 7, 1938; that a contract prepared in accordance with the bid and its acceptance, was submitted to petitioner for execution on December 12, 1938, but that on December 16, 1938, petitioner refused to execute the contract and to fulfill its bid; that, thereafter, a contract was awarded to another for the sum of \$8,800 in excess of the bid of petitioner.

Petitioner's motion to transfer the cause from the law to the equity docket rests upon the following facts, which we quote:

"The plaintiff prepared said plans and specifications for the building and improving of twelve buildings divided into Group A consisting of six buildings and Group B consisting of six buildings and requested that bids be submitted for the building of said buildings according to said plans and specifications. That said bids were to be submitted to the plaintiff in Columbiana, Alabama, on a day certain to-wit: on the 7th day of December, 1938, at 2 o'clock, P.M. The defendant had in its employ one George H. Temme who was employed as an estimator and whose duty was to estimate the cost of all jobs upon which the defendant proposed to bid and upon whose estimates the defendant relied in fixing the amounts of all of its bids. The plans and specifications for the twelve buildings above referred to were delivered to the said George H. Temme approximately one week prior to the date when said bids had to be filed and submitted. In the normal and usual course it would take approximately three weeks for said estimator to properly estimate the cost of said twelve buildings, but he had only one week within which to make his said estimations. Because of the short time within which to make said estimations on these buildings the estimation for said buildings was

far from complete the day before the said bids had to be filed and submitted in Columbiana, Alabama. Therefore, the said George H. Temme, after having worked continuously and long hours for a week was forced to work all night the night before the day when said bids had to be filed, and, in fact, until within forty-five minutes prior to the time when said bids had to be filed. The said estimates and bids were completed only forty-five minutes prior to the time for filing in Columbiana, Alabama, and had to be transmitted to Columbiana within that period. The estimate on No. 877, the Calera School Addition was the last building figured by the said estimator and the estimate for this building was compiled and completed the morning the said bid had to be filed after the said estimator had worked continuously the day and night preceding and had worked for long hours during the week prior thereto. At the time the estimate was completed on the Calera School Addition, the estimator was weary and exhausted in body and mind and his mental faculties were not alert. The method used by the said George H. Temme in estimating said jobs was to set out in one column the estimated cost of labor, to set out in another column the estimated cost of material, and to set out in another column the estimated cost of all subcontracts and total costs of labor, material and subcontracts and to add thereto a reasonable sum for overhead and profit. After having completed the estimate on the Calera School Addition, said George H. Temme, because of his mental and physical condition inadvertently set out the figure for the total estimated cost of materials as the total estimated cost, thereby erroneously omitting the estimated cost of labor and subcontracts in the amount of approximately Thirteen Thousand Sixty-nine dollars (\$13,069).

* * *

"Because of the errors above set forth in the amount of approximately Sixteen Thousand Fifty-four Dollars (\$16,054), which said errors were obvious and were known or should have been known to the plaintiff at the time of the receipt of the bid, there was no meeting of the minds of the parties hereto and no consummated contract between the plaintiff and the defendant and the defendant is entitled to have a court of equity declare its said bid and bid bond null and void." * * *

It has been declared that if, in the expression of the intention of one of the parties to an alleged contract, there is error, and

that error is unknown to and unsuspected by the other party, that which was so expressed by the one party and agreed to by the other is valid and binding as a contract, which the party not in error may enforce. In other words, a party to a contract cannot avoid it on the ground that he made a mistake where there has been no misrepresentation, and there is no ambiguity in the terms of the contract, and the other contractor has no notice of such mistake and acts in perfect good faith. A unilateral error, it has been said does not avoid a contract. * * *

If one of the parties, through mistake, names a consideration that is out of all proportion to the value of the subject of negotiation and the other party realizing that a mistake must have been committed, takes advantage of it and refuses to let the mistake be corrected when it is discovered, he cannot under these conditions claim an enforceable contract. Where there is a mistake that on its face is so palpable as to place a person of reasonable intelligence upon his guard, there is not a meeting of the minds of the parties, and consequently there can be no contract. 6 R.C.L. page 623, section 42; 12 Amer.Jur. 624, section 133, and cases there cited.

In its motion to transfer, petitioner attempts to bring itself within the protection of the rule stated last above. Such a defense can be asserted as well in a court of law as an equity court, for obviously if there is no contract there can be no breach. * * *

(Since the defendant had an adequate remedy at law, the court of equity dismissed his petition.¹⁾)

¹ In these cases of unilateral mistake the validity of the contract is always made to depend upon whether the offeror's error was known or should have been known to the other contracting party. If the bid price is so disproportionately low in comparison to the other bid prices that the owner must have suspected that a mistake had been made, no contract results. *Geremia v. Boyasky*, 107

Conn. 387, 140 A. 749 (1928) (price bid on materials estimate of \$1450, where by mistake in addition the price should have been \$2,200). Compare *Steinmeyer v. Schroeppel*, 226 Ill. 9, 80 N.E. 564, 10 L.R.A.,N.S., 114, 117 Am.St.Rep. 224 (1907), where erroneous materials bid was \$1,446 which should have been \$1,860, and the court held the contract binding.

(E) AS TO QUALITY

Mutual mistake as to the nature or quality of the subject matter will not affect the contract, unless the parties so phrase their agreement as to make nature or quality a condition.

The fact that the subject matter of the contract possessed, or failed to possess, qualities which the parties both believed, or did not believe, it to possess, is not material.

So where a woman sold an uncut stone to a jeweler for \$1, both being ignorant of the true nature of the stone, and it turned out to be a diamond worth \$500, it was held that the contract was binding.²

Similarly, if they dealt with a stone, thinking it to be a diamond, their mutual mistake as to the nature of the stone would not affect the validity of the contract. But if the parties should contract for the sale of "this uncut diamond," in that case the quality of the stone is the very thing bargained for, and a condition of the contract; and if the stone delivered were not a diamond, in such case there would be mutual mistake as to the existence of the subject matter, and no contract.

Reasons of public policy dictate the rule that mistake as to value or quality of the subject matter shall not be ground for rescission. If it were otherwise, it is obvious that there would be no stability in any transaction wherein one party gained an advantage, and the courts would be full of parties seeking to rectify their bad judgments by a recourse to law.

SECTION 3.—FRAUD

(A) IN GENERAL

Fraud is a false representation of a material fact, or the active concealment of a material fact, made with knowledge of its falsity

² Wood v. Boynton, 64 Wis. 265, 25 N.W. 42, 54 Am.Rep. 610 (1885).

and with intention that the other party shall act upon it, and which is relied on and acted upon by the other party to his injury.

Fraud is any spoken or acted falsehood whereby one is induced to enter into what is in form a contract in the belief that it is a different thing from what it is. Like mistake, it affects the reality of consent of the parties.

Fraud may consist either in the statement of what is false, or the suppression of what is true. The statement of what is false is called misrepresentation; the suppression of what is true is called concealment. Mere silence will not in the absence of a duty to speak, amount to fraudulent concealment. Thus passive concealment, or silence, is not fraud; but active concealment, consisting of statements or action calculated to cover up the concealed fact, will be grounds for avoidance of the contract.

In cases of fraud, the injured party may either (1) plead the fraud as a defense to an action by the other party for breach of contract; or (2) he may have the contract set aside on the ground of fraud and recover back the money paid or the property delivered; or (3) he may sue the person guilty of the fraud in a tort action for deceit, and recover a judgment for money damages.

The elements of fraud, all of which must be present, are as follows: (1) A false representation of an existing fact. (2) Knowledge, by the party making the assertion, that the fact stated is untrue. (3) Intention, by the party making the assertion, that the other party will act upon it. (4) The party to whom the false statement made must have been ignorant of its falsity; that is, he must have justifiably relied upon its truth. (5) The party defrauded must have suffered damage. Any material misstatement, knowingly made, with intent to influence another into entering into a contract, will, if believed and justifiably relied on by the other to his damage, afford ground for rescission of the contract, or will constitute a good defense to an action thereon, or will be ground for a tort action for deceit.

The misstatement must be of fact, and not of mere opinion. Thus, to say, "This machine is worth \$1,000," is regarded as a mere statement of opinion; but to say, "It is three years old, and I paid \$2,000 for it, new," is, if untrue, a misrepresentation of a fact. In rare cases, statements as to value are deemed statements of fact, and not of opinion, at least where the parties do not

have equal means of knowledge. So in one case, a statement, made in Chicago, that land in Minnesota offered for sale, was "worth \$16,000," whereas in fact it was worth less than \$3,000, was held to be a statement of fact, because "it was made with the intention that it should be so understood."³

(B) MISSTATEMENT MUST BE OF AN EXISTING FACT, NOT INTENTION

The representation must be of an existing fact; so fraud cannot result from statements of opinion, relief or expectation, nor promises or expressions of intention.

A representation of fact is a statement that a thing was or is; it does not, therefore, include expressions of intention or expectation, or promises, or other representations, that a thing shall be. However, a representation of intention may amount to a fraudulent misrepresentation. There is a distinction between a promise which the promisor, when he makes it, intends to perform, and one which he intends to break. In the first case he represents his true intention that something shall take place in the future, while in the second case he misrepresents his existing situation. He not only makes a promise which he ultimately breaks, but when he makes it he represents his state of mind to be other than it really is. So, when a man buys goods, not intending at the time ever to pay for them, he makes a fraudulent representation.

DAWE v. MORRIS.

Supreme Judicial Court of Massachusetts, 1889.
149 Mass. 188, 21 N.E. 313, 4 L.R.A. 158, 14 Am.St.Rep. 404.

DEVENS, J. The alleged misrepresentations of the defendant, by which the plaintiff avers that he was induced to enter into a contract for building thirty miles of the Florida Midland Railway, are that the defendant had purchased a certain quantity of rails at a certain price, and that he would sell those rails to the plaintiff at

³ Biewer v. Mueller, 254 Ill. 315, 98 N.E. 548 (1912).

the same price if he would make such contract. The plaintiff's declaration alleges that the defendant had not then purchased the rails, and did not sell, and did not intend to sell, any rails * * * to the plaintiff; and that by reason of the contract into which the plaintiff was induced to enter, he was obliged to purchase a large number of rails at a much higher price than that named by the defendant, to his great injury. * * *

A representation, in order that, if material and false, it may form the ground of an action [to avoid a contract] where one has been induced to act by reason thereof, should be one of existing fact. [A statement promissory in its character has to do with something in the future, and is not properly a misrepresentation, but a promise.] The statement by the defendant that he would thereafter sell rails at a particular price if the plaintiff would contract with the railway company, was a promise [for the breach of which the plaintiff may obtain damages in an action thereon; but, as the basis of rescission for fraud, the facts as alleged are insufficient]. * * * Quite a different case would be presented if the defendant had falsely represented to the plaintiff, if unskilled in the price of rails, what their market value then was, and what was the price at which they could then be purchased. * * *

(C) MISREPRESENTATION OF KNOWLEDGE AS FRAUD

CHATHAM FURNACE CO. v. MOFFATT.

Supreme Judicial Court of Massachusetts, 1888.

147 Mass. 403, 18 N.E. 168, 9 Am.St.Rep. 727.

Tort for false and fraudulent representations made by the defendant, whereby the plaintiff was induced to take a lease of a mine, and to purchase certain mining machinery. [Judgment for plaintiff.]

ALLEN, J. It is well settled in this commonwealth that the charge of fraudulent intent, in an action for deceit, may be maintained by proof of a statement made, as of the party's own knowledge, which is false, provided the thing stated is not * * * a matter of opinion, estimate, or judgment, but is susceptible of actual knowledge; and in such case it is not neces-

sary to make any further proof of an actual intent to deceive. The fraud consists in stating that the party knows the thing to exist, when he does not know it to exist; and if he does not know it to exist, he must * * * be deemed to know that he does not. Forgetfulness of its existence after a former knowledge, or a mere belief of its existence, will not * * * excuse a statement of actual knowledge. * * *

In the present case, the defendant held a lease of land, in which there was iron ore. The mine had formerly been worked, but operations had ceased, and the mine had become filled with water and débris. The defendant sought to sell this lease to the plaintiff, and represented to the plaintiff, as of his own knowledge, that there was a large quantity of iron ore, from 8,000 to 10,000 tons, in his ore bed, uncovered and ready to be taken out, and visible when the bed was free from water and débris. [It appeared from the evidence that the representation was not true, but that the bed of ore was not in the land covered by the defendant's lease, but was in the adjoining mine; and the defendant's mine was in fact worked out.]

During the negotiations, the defendant exhibited to the plaintiff a plan of a survey of the mine, which had been made for him, and the plaintiff took a copy of it. In making this plan, the surveyor, with the defendant's knowledge and assent, did not take the course of the first line leading from the shaft through which the mine was entered, but assumed it to be due north; and the defendant never took any means to verify the course of this line. In point of fact, this line did not run due north, but ran to the west of north. If it had run due north, the survey, which was in other respects correct, would have correctly shown the mass of iron ore in question to have been within the boundaries of the land covered by the defendant's lease; but in consequence of this erroneous assumption the survey was misleading, the iron ore being in fact outside of those boundaries. It thus appears that the defendant knew that what purported to be a survey was not in all respects an actual survey, and that the line upon which all the others depended had not been verified, but was merely assumed; and this was not disclosed to the plaintiff. The defendant took it upon himself to assert, as of his own knowledge, that this large mass of ore was in his ore bed, that is, within his boundaries; and in support of this assertion he exhibited the

plan of the survey, the first line of which had not been verified, and was erroneous. Now this statement was clearly of a thing which was susceptible of knowledge. A real survey, all the lines of which had been properly verified, would have shown with accuracy where the ore was situated. It was within the defendant's knowledge that the first line of the plan had not been verified. If under such circumstances he chose to take it upon himself to say that he knew that the mass of ore which had been discovered was in his ore bed, in reliance upon a plan which he knew was not fully verified, it might properly be found that the charge of fraudulent misrepresentation was sustained, although he believed his statement to be true. * * *

[Judgment affirmed.]

(D) CONCEALMENT AS FRAUD

The general rule is that mere silence, or concealment, is not a fraud. Usually, the seller is not under any duty to disclose to the buyer any defects or material facts that might make the seller change his mind about entering into the contract. This occurs where the buyer has an opportunity to discover these things himself. However, there are some relationships where there is a duty to disclose these things. Where there is a fiduciary relation, such as principal and agent, trustee and beneficiary, attorney and client, the law requires full disclosure by the fiduciary.

Material latent defects which are not known to the buyer, and which could not be discovered by an ordinary prudent person, must be disclosed to the buyer. If they are not disclosed to him he can avoid the contract. However, if the defects are patent, and might be discovered by the exercise of ordinary care, and if the buyer has an opportunity to inspect the property, the seller need not point out the defects. But the seller must not resort to active concealment. If he covers up material facts, so as to prevent the other party from discovery, then it is fraud.

BERRY v. ORAHOOD.

Supreme Court of Oklahoma, 1942. 191 Okl. 618, 132 P.2d 645.

Action by J. Fred Orahood against Warren V. Berry and another for cancellation of a deed. Judgment for plaintiff, and defendants appeal.

Affirmed.

OSBORN, J. This action was instituted in the District Court of Cimarron County by J. Fred Orahood, hereinafter referred to as plaintiff, against Warren V. Berry and Ben Forsythe, herein-after referred to as defendants, wherein plaintiff sought the cancellation of a deed to 320 acres of land located in Cimarron County. The deed was executed by plaintiff to defendants. Plaintiff alleged temporary mental incapacity on his part and that defendants were guilty of fraud and deceit. Issues were joined, the cause was tried to the court, judgment was entered in favor of plaintiff and defendants have appealed. * * *

In February, 1940, the Pure Oil Company commenced the leasing of certain lands for oil and gas purposes in the vicinity of the land owned by plaintiff. It was contemplated that a block of approximately 60,000 acres would be procured. On April 15, 1940, the block was fairly well completed but there were certain tracts of land located within the block that had not been leased, including the land of plaintiff. It appears that the defendants did not know where the plaintiff resided but on April 9, 1940, said defendants, accompanied by one Virgil James, began an attempt to locate plaintiff. They went to Hasty, Colorado, then to Mangum, Oklahoma, and from Mangum to Dallas, Texas; they advertised in a Dallas newspaper in an attempt to locate the plaintiff. On April 15, 1940, defendants located plaintiff's wife at a business establishment where she worked and from her learned that plaintiff was then confined in St. Pauls Hospital in Dallas, where he was suffering from a streptococci infection resulting from an injury. Accompanied by plaintiff's wife, defendants went to the hospital and conferred with plaintiff with reference to the purchase of the land. Some conversation was had with reference to the purchase price and later in the evening the parties returned to the hospital where a quitclaim deed was signed by plaintiff and delivered to defendants and a check for

\$125 as the agreed purchase price was delivered to plaintiff's wife. At that time defendants stated that they were acquiring the land for agricultural purposes. No suggestion was made that the mineral rights in the land had become valuable. * * *

Silence as to a material fact is not necessarily, as a matter of law, equivalent to a false representation. *Connelly Bros. v. Dunlap*, 170 Okl. 143, 39 P.2d 155. But if on account of peculiar circumstances there is a positive duty on the part of one of the parties to a contract to speak, and he remains silent to his benefit and to the detriment of the other party, the failure to speak constitutes fraud. *Morris v. McLendon*, 167 Okl. 68, 27 P.2d 811. In determining whether there is a duty to speak consideration must be given to the situation of the parties, the matters with which they are dealing, and the subject matter in hand. *Equitable Life Ins. Co. v. Halsey, Stuart & Co.*, 7 Cir., 112 F.2d 302. Silence alone is not sufficient to constitute fraud; there must have been an obligation to speak. *Salter v. Aviation Salvage Co.*, 129 Miss. 217, 91 So. 340, 26 A.L.R. 987.

American Law Institute, Restatement, Torts, Vol. 3, sec. 551, p. 117, is, in part, as follows: "(1) One who fails to disclose to another a thing which he knows may justifiably induce the other to act or refrain from acting in a business transaction is subject to the same liability to the other as though he had represented the non-existence of the matter which he has failed to disclose, if, but only if, he is under a duty to the other to exercise reasonable care to disclose the matter in question." * * *

Defendants argue that since the parties were dealing at arm's length and that there was no fiduciary relationship between them, the failure to voluntarily disclose all of the facts relating to the value of the property did not constitute actionable fraud. There are a great many cases which hold that a fiduciary relationship between the parties requires full disclosure of material facts, but the duty to disclose does not always depend upon the establishment of such relationship. The relation of the parties, the nature of the subject matter of the contract or the peculiar circumstances of each particular case, may be such as to impose a legal or equitable duty to disclose all material facts. See *Hays v. Meyers*, 107 S.W. 287, 32 Ky.Law Rep. 832, 17 L.R.A.,N.S., 284.

In the instant case the trial court stated its reasons for the conclusion that defendants owed a duty to plaintiff to voluntarily make full disclosure of all the facts relating to the value of the property. There is ample evidence to sustain the findings upon which the conclusion is predicated. The court found that defendants knew of the procurement of oil and gas leases in the vicinity of plaintiff's land; that they went to considerable pains and effort to locate plaintiff; that they informed him that they were purchasing the land for agricultural purposes and that the actual value of the land for this purpose was less than the amount of the indebtedness then existing against it; the evidence is ample to sustain the finding that when the transaction was had the plaintiff was in a weakened physical and mental condition to the extent that he was unable to conduct any business that would require the exercise of judgment; that defendants were informed of the seriousness and gravity of his condition. We therefore think that the trial court was correct in holding that there existed a duty on the part of defendants to make a disclosure of all the facts relating to the value of the property. * * *

SECTION 4.—DURESS

An agreement, if entered into by a party by reason of unlawful compulsion or threats of violence, may be avoided by such party.

In General.—We have seen that, where parties entering into an agreement are mutually mistaken as to the subject-matter, no contract results. We have also noted that, where one party is induced to enter into a contract through fraudulent misrepresentations, it may be set aside at his option. There yet remains to be considered the effect of duress and undue influence upon the essential requisite of free consent.

Definition.—Duress is a species of fraud, except that here *compulsion*, rather than deception, is the means used to induce the other party to enter into the contract. Duress may be defined as actual or threatened violence or imprisonment, by reason of

which a person is forced to consent, in form, to what he otherwise would not.

Duress by Force.—Duress is of two kinds: (1) Duress by force; and (2) duress by threats. Duress by force includes both the actual application of unlawful force to a person, or to his near relative, thereby inducing the said person to agree to what he otherwise would not, and the unlawful physical restraint of a person, or his near relative, thereby inducing the person to pay money, deliver property, or enter into any contract, to secure his release, or the release of the near relative, from such restraint. This latter is called duress by imprisonment.

It is to be noted that the duress may be directed against the person himself, or against his near relative, such as wife, husband, parent, child, brother, or sister. The test of duress is subjective. Was the compulsion employed sufficient to overcome the will, not of a person of "ordinary" courage or firmness, but of the actor himself?

Duress by Threats.—In addition to duress by actual force or actual imprisonment, there may be duress by threats of the same. The threats may be against the promisor's own person, or against his near relatives, as mentioned above. Duress by threats of prosecution must be of prosecution for crime. Threats of civil suits could not constitute duress.

Effect of Duress.—Contracts entered into under duress are voidable at the option of the party intimidated. The party intimidated may obtain the following relief:

- (1) He may have the contract rescinded in equity.
- (2) He may set up the duress as a complete defense to an action at law on the contract.
- (3) He may sue at law to recover any money or property paid under duress. The law implies a promise by the party guilty of the duress to repay that which was so obtained.

SECTION 5.—UNDUE INFLUENCE

Undue influence is such influence of another person as actually overcomes and supplants the other will, causing him to enter into a contract, to convey property, to make a will, or otherwise change his legal status without the real wish to do so. Reality of consent is lacking, so the effect of undue influence is to render the act voidable at the option of the injured party.

In General.—In fraud, that which destroys the reality of consent necessary to form a contract is the deception by means of which the party defrauded is induced to enter into the agreement. In duress, the means used is intimidation or compulsion. In undue influence, it is the misuse of power held by one person over another. A presumption of undue influence will arise where the parties stand in confidential relations in which one naturally possesses an advantage over the other. In such case it will be necessary for the party seeking to hold the benefit of a contract or conveyance to show perfect fairness on his part and no abuse of power.

Mental Weakness.—In general, it is true that a person seeking to set aside a contract or conveyance of land on the ground of undue influence must prove that improper means were used; but, as indicated above, wherever circumstances give to one individual unusual power over the will and mind of another, the law will *presume* undue influence in the case of transactions to the great advantage of the superior and the corresponding disadvantage of the inferior. For example, where an old lady, past eighty, made a deed of land as a gift to her physician, a man who had for a long time been in constant attendance upon her, advising her in everything, it was held that these circumstances created a presumption of undue influence, and that, unless the grantee could rebut the presumption by proof of full disclosure, fair dealing, and absence of fraud and undue influence, the deed would be set aside.

Family Relations.—Another class of circumstances which will raise the presumption that undue influence was used in procuring

another to enter into a contract is where the party benefited stood in some such relation to the other as to render that other peculiarly subject to influence. Such relation existed in the example given above, and it also exists between husband and wife, parent and child, brother and sister, and to all cases where from age or character one member of the family exercises substantial authority over the others.

Fiduciary Relations.—Similarly, where one person stands in a confidential or fiduciary relation to another, a contract made between them is presumed invalid on the ground of undue influence. Thus a contract between a trustee and the beneficiary of the trust, or between a guardian and his ward, an attorney and his client, doctor and patient, etc., is looked upon with suspicion; and if the person in the position of confidence has greatly benefited, the courts will presume that he has used his power to his own advantage, and in order that the contract may stand he must show the contrary.

CHAPTER 6

CONTRACTS WHICH MUST BE IN WRITING

Section

1. In General.
 2. Contracts for the Sale of Lands.
 3. Contracts Not to be Performed within a Year.
 4. Contracts of Guaranty.
 5. Contracts of Executors and Administrators.
 6. Contracts in Consideration of Marriage.
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SECTION 1.—IN GENERAL

The English "Statute of Frauds," enacted in 1676, has been copied, modified, and enlarged in the various states of the United States. By such statutory requirement, no action may be brought upon any of the following kinds of agreement, unless such agreement be in writing and signed by the party to be charged:

- (1) A contract for the sale of goods of the value of five hundred dollars¹ or upward;
- (2) A contract for the sale of lands or any interest in them;
- (3) A contract not to be performed within one year from the making thereof;
- (4) A contract to answer for the debt of another;
- (5) A promise of an executor or administrator to answer damages out of his own estate;
- (6) An agreement made upon consideration of marriage.

The five essentials to a contract illustrated in the preceding five chapters, namely, agreement, consideration, capacity, legality, and reality of consent, are the requisite elements of every enforceable contract, but in some contracts a sixth essential is nec-

¹This is the amount stated in section 4 of the Uniform Sales Act, a section based upon section 17 of the statute of frauds. The amount stated

in the original statute of frauds was £10. The statutes of some of the states vary from the amount stated in the Uniform Sales Act.

essary in addition to the other five. This sixth essential, applying only to those certain kinds of contracts regarded by the legislative authority as of too great importance to be left to the "uncertain and slippery testimony of witnesses," is that the agreement must be *in writing and signed by the party to be charged*. The Statute of Frauds, originally enacted by the British Parliament in 1677, and subsequently included in the statutory law of all of the American states, provides that, of the many types of contracts which parties may enter into, six of these must be evidenced by a writing in order to be provable in court.

Effect of the Statute of Frauds.—An oral contract is quite as valid as a written one. The Statute of Frauds does not render any contract invalid or void because not in writing; it merely provides that, to prove certain kinds of contracts in court, a writing will be necessary. In other words, to prove the existence of the kinds of contracts enumerated in the statute, written evidence must be produced rather than oral.

The Statute of Frauds applies only to actual contracts of the parties; it does not include the so-called contracts implied in law, or quasi contracts. Thus, if an oral contract to which the statute applies has been executed or performed on one side, as where a purchaser of land has paid over the purchase price, he may sue in quasi contract to recover the money, if the seller, relying on the statute, refuses to perform his oral contract to convey.

Contracts Within the Statute of Frauds.—Prior to the enactment of the Statute of Frauds, all contracts could be proved by oral evidence. It was found, however, that certain kinds of contracts were of too great importance to be left to the uncertain proof of witnesses, and for these classes of contracts the statute provides that only written evidence may be admitted to prove them. Contracts for the sale of personal property above a certain amount; contracts for the sale of real property; contracts of suretyship; contracts in consideration of marriage; and all contracts not to be performed within one year—are the most important classes of agreements which the statute provides must be in writing.

The first Statute of Frauds was passed in England in the seventeenth century, and it has been in substance re-enacted in all

the states of the United States. The fourth and the seventeenth sections of the Statute of Frauds contain the provisions in which we are interested.

"Section 4. No action shall be brought to charge any executor or administrator on any special promise to answer damages out of his own estate; (2) or to charge the defendant upon any special promise to answer for the debt, default, or miscarriage of another person; (3) or to charge any person upon any agreement made upon consideration of marriage; (4) or upon any contract or sale of lands or any interest therein; (5) or upon any agreement that is not to be performed within one year of the making thereof; unless the agreement or some memorandum or note thereof shall be in writing and signed by the party to be charged, or by some person thereunto by him lawfully authorized."

"Section 17. No contract for the sale of any goods, wares, and merchandises for the price of ten pounds sterling, or upwards, shall be allowed to be good, except the buyer shall accept part of the goods so sold, and actually receive the same, or give something in earnest to bind the bargain, or in part payment, or that some note or memorandum in writing of the said bargain be made and signed by the party to be charged, or their agents thereunto lawfully authorized."

Since the provisions of the Statute of Frauds relating to sales of goods pertain directly to the subject of Sales, we will defer analysis of this subject to the subsequent chapter on Sales.

SECTION 2.—CONTRACTS FOR THE SALE OF LANDS

The fourth section of the statute of frauds provides: No action shall be brought upon any contract for the sale of lands, tenements, or hereditaments, or any interest in or concerning them, unless the agreement upon which such action shall be brought, or some memorandum or note thereof shall be in writing, and signed by the party to be charged therewith or some other person thereunto by him lawfully authorized.

The difficulty in application of this section of the statute is to determine in a particular case whether the thing contracted for is an interest in land or whether it is personality. A building attached to land becomes part of the land, and fixtures in the building thereby become realty also. It is possible for the owner of the land to detach the fixtures and so change their character to personality.

Leases of land for more than one year convey an estate in the land—a leasehold estate for a term of years. Therefore, they are within the operation of the statute of frauds. A lease for one year or less does not pass an interest in land, and so may be oral.

Part performance of an oral contract for the sale of land will take the contract out of the statute of frauds, within the limits defined in the cases following.

MILLER v. BALL.

Court of Appeals of New York, 1876. 64 N.Y. 287.

Appeal from judgment of the General Term of the Supreme Court in the Third Judicial Department, affirming a judgment in favor of plaintiff. * * *

This action was brought to compel a specific performance of an alleged parol contract for the sale of land.

[The referee found in substance the following facts: That plaintiff made a verbal contract with defendant for the purchase of fifty acres of land at three dollars an acre; that the said purchase price was paid by the plaintiff to the defendant; that the plaintiff entered upon the land, cut and constructed a road thereto across the adjoining land of other parties, underbrushed and cut up fallen trees, preparatory to clearing about a quarter of an acre of land, built a bough shanty, and since that time and down to the commencement of this action he continued in the occupancy of the said lot, cutting trees and timber upon it, and paying the taxes thereon, and also continued to labor and improve the roads upon the lot and those connecting the same with the public highway.]

EARL, J. We will assume, for the present purpose, that there was not a sufficient note or memorandum of the agreement be-

tween the parties to satisfy the requirement of the statute of frauds, and we still reach a conclusion adverse to the appellant.

* * *

It is not always easy to determine whether there has been sufficient part performance of a parol agreement for the sale of land in the sense of courts of equity to free [the contract] from the operation of the statute of frauds. [The general rule is that the part performance must be sufficient so that refusal to perform the agreement by the other party will operate as fraud. The statute of frauds was enacted to prevent fraud, not to permit it. Therefore courts of equity, though not courts of law, have adopted the principle that a sufficient part performance of an oral contract for the sale of land will operate to take the contract out of the statute.] Taking possession under a parol agreement, with the consent of the vendor, accompanied with other acts which cannot be recalled so as to place the party taking possession in the same situation that he was in before, has always been held to take such agreement out of the operation of the statute.

* * *

The payment of the consideration alone, in a case where its recovery in an action at law would fully indemnify the party paying, would not be a sufficient part performance within the rule, * * * and neither would mere possession be, without any other circumstance of hardship or fraud. [But payment of part of the purchase price, and possession under the agreement, coupled with such facts as the making of lasting and valuable improvements, are generally considered in equity as sufficient part performance to take the contract out of the statute and make it enforceable though oral.] Here the whole consideration money was paid, and the plaintiff took all the possession of such a lot which is ordinarily practicable. He built roads to it and upon it; built a shanty and made some clearing. His improvements thus made were probably equal in cost to the consideration paid for the lot, and that cost would be lost to him unless the defendant be compelled to perform his agreement. He paid the taxes, and the money thus paid he cannot recover back. I am therefore of opinion that enough was done by the plaintiff to bring his case within the equitable rule as to part performance.

* * *

Judgment affirmed.

CERVADORO v. FIRST NAT. & TRUST CO. of HUDSON.

Supreme Court of New York, Appellate Division, Second Department, 1944.
267 App.Div. 314, 45 N.Y.S.2d 738.

CARSWELL, J. The amended complaint alleges that on March 27, 1937, plaintiff made a contract with defendant under which he was to pay defendant \$100 and demolish a building in Hudson, New York; that he was immediately to become the owner of the building and its component parts; that he was to be compensated by the salvage, which he was to store on a specified part of the land until such time as the tract should be sold; that he paid defendant \$100, began the demolition of the building, and duly performed all the terms of the contract on his part to be performed, except in so far as he was prevented by defendant; that defendant breached the contract in that it refused to permit plaintiff to continue his work thereunder; and that by reason thereof he was damaged in the sum of \$7,000.

In its answer, defendant set out as a second defense that the contract was oral and, under the Statute of Frauds, Real Property Law, § 259, is void, as it is a contract for the sale of an interest in real property, and is, therefore, required to be in writing.

Defendant moved for summary judgment under Rule 113, Rules of Civil Practice. In the affidavit of one of its officers, it asserted, inter alia, that it orally sold the house to plaintiff and that he agreed "to promptly tear down and raze said house to the ground level and to remove the same * * *." Plaintiff, in his affidavit, stated that the action was to recover damages for breach of an agreement under which he was to raze the building; that the parties treated the building as personality, and that he had partly demolished the building when defendant made a new arrangement with another to demolish the structure and remove the salvage.

The contract has been held to be void, and judgment has been entered dismissing the complaint.

The general rule formerly was that if a person sold a building or thing attached to the land, and the seller was to sever the same and deliver it to the buyer, the contract relating thereto might rest in parol, on the theory that it concerned personality. *Killmore v. Howlett*, 48 N.Y. 569; *Webster v. Zielly*, 52 Barb.

N.Y. 482. Conversely, prior to the enactment of the Uniform Sales Act, if the severance of the building was to be made by the buyer, the contract constituted a sale of an interest in real property and was required to be in writing. Thomson v. Poor, 57 Hun 285, 10 N.Y.S. 597; Volk v. Olsen, 54 Misc. 227, 104 N.Y.S. 415; Green v. Armstrong, 1 Denio, N.Y., 550; Vorebeck v. Roe, 50 Barb.N.Y., 302; Thayer v. Rock, 13 Wend.N.Y., 53. Most of the cases which enforced the latter rule related to situations where the severance of the buildings was to be deferred for specified periods or was to be at the buyers' convenience. The rule, however, was not invariable. By their engagements parties were free to treat buildings attached to the land as personalty or chattels, especially where the removal of the same was to be had immediately. Richardson on Contracts, 5th Ed., § 258 and cases cited.

The versions of both parties herein are that the building was to be "promptly" demolished, and *prima facie* it appears that the parties intended to treat the buildings as personalty. The principle to which we have adverted was given effect in Melton v. Fullerton-Weaver Realty Co., 214 N.Y. 571, 575, 108 N.E. 849. There, as here, the buyer of the building paid a purchase price and was to demolish the building at once and complete the job within a specified time. The buyer was put off the job before the demolition had been completed. The buyer brought an action in conversion for the unsevered and severed materials. It was held that upon the execution of the agreement the title to the building as "a chattel" vested in the buyer and, therefore, an action in conversion was proper inasmuch as personal property was involved in the transaction. The contract was in writing but that fact does not distinguish it from the case at bar. The subject matter of the transaction here was personal property and the form of the contract is regulated by section 85 of the Personal Property Law, which provides that a contract for the sale of personal property valued in excess of fifty dollars "shall not be enforceable by action unless the buyer shall * * * give something * * * in part payment" or shall be in writing. Here a part payment was made, and, therefore, a writing was not needful, just as a writing was not necessary in the Melton case, *supra*. * * *

Reversed.

SECTION 3.—CONTRACTS NOT TO BE PERFORMED WITHIN A YEAR

"No action shall be brought upon any agreement that is not to be performed within the space of one year from the making thereof, unless the agreement upon which such action shall be brought, or some memorandum or note thereof shall be in writing, and signed by the party to be charged therewith or some other person thereunto by him lawfully authorized."²

Where a contract, by its terms, cannot be performed within one year from the making, it is within the statute and so unenforceable unless in writing; but, if the contract is such that it *may* be performed before the lapse of a year, it is not within the statute. Thus all negative covenants personal in nature are outside the statute, since the promisor's death, as possible within the year, would perform the covenant. For example, A sells his store and covenants not to re-enter the same business in that community for five years. If A were to die within the year, his death would leave the contract fully performed.

An agreement made on the first day of the year, to cover the last day of the year, is not within the statute.

WARNER v. TEXAS & P. RY. CO.

Supreme Court of the United States, 1896.

164 U.S. 418, 17 S.Ct. 147, 41 L.Ed. 495.

In Error to the United States Circuit Court of Appeals for the Fifth Circuit.

This was an action brought May 9, 1892, by Warner against the Texas & Pacific Railway Company, a corporation created by the laws of the United States, upon a contract made in 1874, by which it was agreed between the parties that, if the plaintiff would grade the ground for a switch, and put on the ties, at a certain point on the defendant's railroad, the defendant would put down

² Statute of Frauds, § 4.

the rails, and maintain the switch for the plaintiff's benefit for shipping purposes as long as he needed it. The defendant pleaded that the contract was oral, and within the statute of frauds, because it was "not to be performed within one year from the making thereof," and because it was "a grant or conveyance by this defendant of an estate of inheritance, and for a term of more than one year, in lands." * * *

Mr. Justice GRAY, after stating the case, delivered the opinion of the court.

The statute of frauds of the state of Texas, re-enacting, in this particular, the English statute of 29 Car. II, c. 3, § 4 (1677), provides that no action shall be brought "upon any agreement which is not to be performed within the space of one year from the making thereof," unless the "agreement upon which such action shall be brought, or some memorandum or note thereof, shall be in writing, and signed by the party to be charged therewith, or by some person by him thereunto lawfully authorized." Tex.St. Jan. 18, 1840. Vernon's Ann.Civ.St. Tex. Art. 3995.
* * *

It thus appears to have been the settled construction of this clause of the statute in England, before the Declaration of Independence, that an oral agreement which, according to the intention of the parties, as shown by the terms of the contract, might be fully performed within a year from the time it was made, was not within the statute, although the time of its performance was uncertain, and might probably extend, and be expected by the parties to extend, and did in fact extend, beyond the year.

The several states of the Union, in re-enacting this provision of the statute of frauds in its original words, must be taken to have adopted the known and settled construction which it had received by judicial decisions in England. * * *

In *Blanding v. Sargent*, 33 N.H. 239, the court stated the rule, as established by the authorities elsewhere, and therefore properly to be considered as adopted by the legislature of New Hampshire when re-enacting the statute, to be that "the statute does not apply to any contract, unless by its express terms or by reasonable construction it is not to be performed—that is, incapable in any event of being performed—within one year from the time

it is made"; and that "if, by its terms, or by reasonable construction, the contract can be fully performed within a year, although it can only be done by the occurrence of some contingency by no means likely to happen, such as the death of some party or person referred to in the contract, the statute has no application, and no writing is necessary"; and, therefore, that an agreement by a physician to sell out to another physician his business in a certain town, and to do no more business there, in consideration of a certain sum to be paid in five years, was not within the statute, because, "if the defendant had died within a year from the making of the contract, having kept his agreement while he lived, his contract would have been fully performed." The decisions in other states are to the same effect. * * *

In the case at bar, the contract between the railroad company and the plaintiff, as testified to by the plaintiff himself, who was the only witness upon the point, was that, if he would furnish the ties and grade the ground for the switch at the place where he proposed to erect a sawmill, the railroad company would "put down the iron rails and maintain the switch for the plaintiff's benefit for shipping purposes as long as he needed it." * * *

The contract of the railroad company was with, and for the benefit of, the plaintiff personally. The plaintiff's own testimony shows (although that is not essential) that he understood that the performance of the contract would end with his own life. The obligation of the railroad company to maintain the switch was in terms limited and restricted by the qualification "for the plaintiff's benefit for shipping purposes as long as he needed it," and no contingency which should put an end to the performance of the contract, other than his not needing the switch for the purpose of his business, appears to have been in the mouth or in the mind of either party. If, within a year after the making of the contract, the plaintiff had died, or had abandoned his whole business at this place, or for any other reason had ceased to need the switch for the shipping of lumber, the railroad company would have been no longer under any obligation to maintain the switch, and the contract would have been brought to an end by having been fully performed.

The complete performance of the contract depending upon a contingency which might happen within the year, the contract is not within the statute of frauds as an "agreement which is not

to be performed within the space of one year from the making thereof." * * *

Judgment reversed, and case remanded to the circuit court, with directions to set aside the verdict, and to order a new trial.

SECTION 4.—CONTRACTS OF GUARANTY

The Statute of Frauds provides:

No action shall be brought whereby * * * to charge the defendant upon any special promise to answer for the debt or default of another unless the agreement upon which such action shall be brought, or some memorandum or note thereof, shall be in writing and signed by the party to be charged therewith, or some other person by him authorized.

A contract to answer for the debt or default of another must therefore be evidenced by a writing in order that it be enforceable. The difficulty here is in distinguishing between promises that are original and those collateral to the debt of the other person. If the former, obviously that promise would not be within the statute.

A collateral promise, in the first place, of necessity implies a debt of another person to which it relates. If one person says to another, "Deliver goods to A, and I will pay you," the verbal promise is original, and not within the statute, for A owes no debt to the party who furnishes the goods. But if, instead of saying, "I will pay you," he says, "I will see you paid," or "I will pay you if A does not," or uses equivalent words showing that the debt is in the first instance the debt of A, the promise is collateral, and not valid unless in writing.

In the second place, a promise to be collateral must be so, not only in form, but in actuality. The real purpose of the promisor is the test. If the leading object of the promise is simply to become surety or guarantor to the promisee, for another's debt, then in form and substance the promise is collateral. But if the real purpose of the promisor is to subserve some pecuniary in-

terest of his own, then the promise, though collateral in form, is in reality original, and not within the statute.

This section of the Statute of Frauds is of particular interest to those connected with construction work. Cases often arise where a contractor or subcontractor fails to pay for labor or materials, and the owner verbally agrees to pay therefor, so that the work may continue. Where the owner thus assumes the obligation his promise is original and not within the statute.

Although the difference between original and collateral promises is sometimes clearly discernible, often the question is one of considerable doubt. Therefore the only safe procedure is to see that promises which in form answer for another's debt are in writing, and thus remove one cause of possible litigation.

PETERSON v. PAXTON-PAVEY LUMBER CO.

Supreme Court of Florida, 1931. 102 Fla. 89, 135 So. 501.

BUFORD, C. J. Plaintiff in error, defendant in the court below, was the owner and contracted with certain builders to construct a building on his property. The builders ordered material from the defendant in error, plaintiff in the court below. The contractors became in arrears in payments to the materialman. The owner, about the 14th day of December, 1927, went to the materialman and made inquiry as to why material was not being delivered to the contractors. He was told that no more material would be delivered until the materialman received some money on his account. The owner guaranteed the payment of \$1,000 on the account, and, it is alleged, promised to pay for the balance of the material furnished. He later caused the \$1,000 to be paid. After that date it is alleged that \$390.47 worth of material was furnished. At the close of the transaction, the contractors owed the plaintiff \$1,422.69. The plaintiff sued the defendant to recover this amount with interest from February 10, 1928. Judgment was in favor of plaintiff in the sum of \$1,678.77 and costs.

The case made by plaintiff only entitled him to recover from the defendant the sum of \$390.47. The balance of plaintiff's claim against the defendant was based upon an alleged promise

to pay the debt of another, which promise was not in writing, and therefore was within the purview of the statute of frauds.

In other words, the case is this: The contractor owed the materialman a large amount of money. The materialman refused to furnish more material until he received at least a part of what was due him. The owner guaranteed the payment of \$1,000, and, it may be reasonably concluded from the evidence, agreed orally to pay for such material as should thereafter be furnished to the contractor to complete the construction, and, the plaintiff contends, also agreed to pay the remainder of the contractor's bill. If and when defendant agreed to pay for the material that should thereafter be furnished to the contractor he did not thereby assume to pay the debt of another, but assumed the initial obligation. On the other hand, if the defendant did agree to pay the balance of the indebtedness at that time due from the contractor to the materialman, this was an obligation to pay the debt of another and under the statute of frauds is required to be in writing. See *Martyn v. Amold*, 36 Fla. 446, 18 So. 791; *West v. Grainger*, 46 Fla. 257, 35 So. 91.

For the reason stated, the judgment was excessive.

If the plaintiff shall within thirty days after the filing of the mandate herein in the lower court enter a remittitur of an amount sufficient to reduce the judgment herein to the sum of \$390.47 as of the date of its rendition with interest thereon from February 10, 1928, at 8 per cent., the judgment for such sum remaining after such remittitur is entered shall stand affirmed. Otherwise the judgment will be reversed. It is so ordered.

Affirmed, conditioned on remittitur.

SECTION 5.—CONTRACTS OF EXECUTORS AND ADMINISTRATORS

The statute of frauds provides that no action shall be brought whereby to charge any executor or administrator upon any special promise to answer damages out of his own estate, unless the agreement upon which such action shall be brought, or some memorandum

or note thereof shall be in writing, and signed by the party to be charged therewith or some other person thereunto by him lawfully authorized.

An executor or administrator is the personal representative of the deceased. An administrator is appointed by a probate court to administer the estate of a decedent who has left no will. An executor is named by the testator in the will, and is confirmed in the appointment by the court. Except for this difference in the source of their authorization, there is no difference between the two; their duties are the same. An executor or administrator may sue or be sued upon debts owed by or to the deceased's estate. He is charged with the duty of discharging the deceased person's existing debts, and distributing the balance of the estate to the beneficiaries under the will or to the heirs, if there is no will. In no case except where his promise is in writing, is he bound to pay anything out of his own pocket. His liabilities are limited by the assets of the deceased person.

The statute does not apply to promises of an executor or administrator to pay debts of the decedent out of the assets of the estate, but only to pay out of his own funds. Also it applies only to the decedent's existing debts. Thus a promise by an executor to pay an heir money if he will forbear opposition to the probate of the will is an original promise not within the statute, and enforceable though oral.

SECTION 6.—CONTRACTS IN CONSIDERATION OF MARRIAGE

The Statute of Frauds provides:

No action shall be brought to charge any person upon any agreement made upon consideration of marriage unless the agreement upon which such action shall be brought, or some memorandum or note thereof shall be in writing and signed by the party to be charged therewith or some other person thereunto by him lawfully authorized.

This clause of the statute does not apply to mutual promises to marry; these, though oral, are enforceable. It applies rather

to promises to pay money, or to make a settlement of property, if a marriage is consummated. Because the amount of money or property involved is likely to be large, and because false testimony as to the terms of such promises might frequently be made, this class of agreements was included among those contracts not enforceable unless in writing.

CHAPTER 7

THE PERFORMANCE OF CONTRACTS

Section

1. Breach of Condition Precedent as Excuse for Nonperformance.
 2. Prevention as Excuse for Nonperformance.
 3. Anticipatory Breach as Excuse for Nonperformance.
 4. Waiver as Excuse for Breach of Conditions.
 5. Impossibility as Excuse for Nonperformance.
 6. When There may be Recovery for a Part Performance.
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SECTION 1.—BREACH OF CONDITION PRECEDENT AS EXCUSE FOR NONPERFORMANCE

A promise may be absolute, or it may be made conditioned upon the doing or refraining from doing of certain acts by the promisee, or upon the happening of certain events. If the act or event is to precede, in point of time, the promisor's obligation to perform, it is said to be a condition precedent.

Conditions may be express or implied. Where the parties have, by express language in the contract, made performance of any term a condition to the whole duty of performance by the other party, the condition is express. Where they have not done so, still, where a term in the contract is so important as to be essentially the very thing contracted for by the other party, that term will by implication be regarded as a condition.

Breach of a condition precedent excuses the other party from further duty of performance, and in addition gives him an action for damages.

We have considered in the preceding six chapters the six elements essential to the formation of a binding contract. There yet remains the subject of performance and breach. What are the rights and liabilities of the parties in case of a breach, or failure to perform? Where each party fully performs those acts which he has promised to perform, the contract is executed or discharged. But if one of the parties fails to perform at all, or

performs only partially, what remedy will the law afford the other party to the contract?

The general rule is that for any breach of contract, for any failure to perform the act promised, the party in default will be held liable in damages. No matter how trivial the breach, the law will award damages to the aggrieved party. Furthermore, in cases where the breach is a very serious one, the law will excuse the aggrieved party from the performance of his duty under the contract, in addition to giving him an action for money damages. Thus a breach of contract by one party may discharge the other from all further liability thereunder. It is our purpose in this chapter to discover under what circumstances a party may be relieved from his contract by reason of a breach by the other party.

If the promise of one party to a contract is a conditional promise—that is, if his duty of performance is not absolute, but is conditioned upon the duty of performance of the other party—then quite clearly, if the other does not perform, the first party need not perform. When A promises to pay B \$25 to dig a ditch, all would agree that until B had dug the ditch A would be under no duty to pay the money. A's promise is conditioned upon the performance of B's promise. B's duty to dig the ditch is said to be a *condition precedent* to A's duty to pay the money; precedent because it precedes A's duty in point of time.

A statement of the effect of breach is as follows:

- (1) The breach of any term of a contract gives the other party a right of action for damages.
- (2) The breach of a condition precedent, in addition to a right to damages,¹ excuses the other party from his duty of performance under the contract.

¹ Failure of the happening of a condition in all cases will discharge the contract; but it should be understood that the additional right to damages exists only in the case where there has been a promise that the condition shall happen. For example, if A says to B: "I will pay you \$1000. for my portrait, provided that when it is

finished it is to my satisfaction, otherwise I pay you nothing," the satisfaction of A is a condition precedent to his liability, but obviously if it be not to his satisfaction he has no action against B.

Stated conversely, every breach of promise will subject the promisor to an action for damages for breach of

In many of the cases following, the plaintiff is suing the defendant for his breach of contract. The defendant pleads that he is no longer under a duty to perform because of some prior breach of the contract by the plaintiff, and the issue is joined on the question whether the particular breach of which the plaintiff is guilty was or was not a condition precedent to defendant's liability. If it was a condition precedent, the plaintiff cannot now recover, for by such a breach the defendant is excused from the contract. If it was not a condition precedent, the defendant was not excused and will have to perform, being entitled only to money damages for plaintiff's breach.

What, then, will amount to the breach of a condition? The cases which follow contain the general principles upon which the answer to this question depends. These cases illustrate the legal effect of the clauses generally contained in construction contracts. As will be discovered from an analysis of the cases, conditions may be of two kinds, express and implied. The parties may by express language make the performance by one party of any term of the contract a condition to the whole duty of performance by the other party. If they have done so, the breach of such term, no matter how slight, will operate to excuse the other party from carrying out his part of the contract, and give him a right to damages. If they have not done so, still, where there has been a serious or material breach of a material or important term of the contract, the court will say that the implied intention of the parties was that this was to be considered the breach of a condition precedent, it being the thing bargained for, and will declare the injured party thereby excused from the contract and entitled to damages. We shall consider separately express and implied conditions precedent.

(A) EXPRESS CONDITIONS PRECEDENT

(1) *Arbitration Clauses as Conditions*

“* * * In the event that the owner and contractor shall fail to agree on any question of fact arising out of this contract, the contract; and in addition, if the term amount to a condition to the promisee's own duty of performance,

will excuse such promisee from the contract.

matter shall be referred to a board of arbitration, to consist of one person selected by the owner and one by the contractor, the two to select a third. The decision of this board shall be final and binding on both parties hereto. NO ACTION SHALL BE MAINTAINED ON THIS CONTRACT, EXCEPT AFTER AN AWARD FIXING THE AMOUNT OF THE CLAIM, AS PROVIDED BY THE AGREEMENT TO ARBITRATE. (From standard form construction contract.)

ANDERSON et al. v. ODD FELLOWS' HALL OF JERSEY CITY

Court of Errors and Appeals of New Jersey, 1914. 86 N.J.L. 271, 90 A. 1007.

[Action by John B. Anderson and others against the Odd Fellows' Hall of Jersey City. Judgment for defendant, and plaintiffs appeal.]

BERGEN, J. This action was instituted to recover the value of extra work and materials furnished by the plaintiffs, in excess of what a contract between the plaintiffs and defendant for the construction of a building required. The plaintiffs had judgment in the district court for \$297, and the defendant appealed to the Supreme Court, where the judgment below was reversed, and a judgment of nonsuit ordered entered in the district court for two reasons, the first being that a covenant contained in the contract requiring arbitration in certain matters, was a condition precedent, and that without its performance the plaintiffs could not recover. * * * In our opinion, the covenant for arbitration contained in this contract is not a condition precedent to an action for the recovery of the extra work sued for.

The contract on this subject provides that: "No alteration shall be made in the work except upon written order of the committee, the amount to be paid by the owner, or allowed by the contractors by virtue of such alterations, to be stated in said order. Should the owner and the contractors not agree as to amount to be paid or allowed, the work shall go on under the order required above, and in case of failure to agree the determination of said amount shall be referred to arbitration as provided for in article 12 of this contract."

Article 12 provides that: "In case the owner and contractors fail to agree in relation to matters of payment, allowance, or loss

referred to in articles 3 or 7 of this contract, or should either of them dissent from the decision of the committee referred to in article 7 * * * the matter shall be referred to a board of arbitration, to consist of one person selected by the owner and one person selected by the contractors, these two to select a third. The decision of any two of this board shall be final and binding on both parties hereto."

The condition to arbitrate, as expressed in this contract, is not, by its terms, made a condition precedent to an action to recover for extra work. It is nothing more than an agreement to arbitrate disputes regarding the amount to be allowed for extra work ordered and performed, in cases where the parties cannot agree, revocable at any time before it is fully executed and an award made, and the bringing of a suit amounts to a revocation. *Reed v. Washington Ins. Co.*, 138 Mass. 572.

In the case of *Wolff v. Liverpool & L. & G. Ins. Co.*, 50 N.J. L. 453, 14 A. 561, the agreement contained a stipulation that no action should be maintained until after an award be obtained fixing the amount of the claim, as provided by the agreement to arbitrate. This was held to be a condition precedent, but Chief Justice Beasley, who delivered the opinion of the court, distinguished such condition from a case where the agreement merely declares that, if the parties shall disagree as to the amount, such difference shall be arbitrated, which is the situation in the present case, for there is here no contract that the amount shall not be recoverable by suit until after arbitration, or the recovery limited to a sum to be fixed by arbitrators, or that arbitration shall be a condition precedent to a right of action, and therefore the arbitration covenant in this contract is not a condition precedent. * * *

The weight of authority favors the rule that, where the contract provides for submission to arbitration of matters of dispute arising under it, such agreement is a condition precedent where it is provided that an action can only be brought for a sum to be fixed by arbitrators, or that no action shall be brought until there has been an arbitration, or that arbitration shall be a condition precedent to a right of action, but, where no such covenants are present, and there is simply a covenant to pay, and another covenant to arbitrate, they are distinct and collateral, and the covenant to arbitrate [the arbitration and award] is not in such case,

a condition precedent. The covenant to arbitrate in the present case being distinct and collateral, and the right of action not having been made dependent upon the result of arbitration, it is not a condition precedent, and the judgment of the Supreme Court based upon this ground cannot be sustained. * * *

[Reversed, and new trial granted.]

(2) *Written Order as Condition to Recovery for Extra Work*

"* * * Any extra work to be performed by the contractor must be upon the written order of the engineer; and the written orders of the engineer to the contractor to perform any extra work are conditions precedent to any recovery on the part of said contractor for any such work performed." (From standard form construction contract.)

TRUSTEES OF ILLINOIS INSTITUTION FOR EDUCATION
OF THE DEAF AND DUMB v. PLATT.

Appellate Court of Illinois, 1879. 5 Ill.App. 567.

MCCULLOCH, J. This suit was brought by appellee against appellants to recover for extra work alleged to have been performed by him, in the building of the dining hall and hospital building, to be used in connection with the Institution for the Education of the Deaf and Dumb at Jacksonville. Appellee and one Thomas Carson had a contract with appellants for the erection of said building, by which they agreed that they would, in the best workmanlike manner, and according to the best mechanical art and skill, well and substantially erect, build, set up and deliver finished and completed ready to be occupied, the brick and stone work and plastering of the said building, according to the plans, specifications and detail drawings furnished by E. E. Myers, architect; the work and materials to be sufficient to fully complete the building so that there should be no extras or extra charges for the entire completion of said work, except where the same should be the result of changes in the plans, materials or labor, which appellants were at liberty to make at pleasure; the plans and specifications being signed and sealed by the parties

and to be considered as part of the contract. By mutual agreement, Thomas Wadell was appointed superintendent of said building, to whose directions the contractors were to conform. In consideration of the performance of the work, appellants were to pay the contractors twenty thousand five hundred dollars, at certain stipulated periods, as the work progressed. It was further agreed that, if there should be any alterations or changes in any of the work or the materials required during the construction of the building (which appellants were at liberty to make at pleasure), they must be stated in the contract in writing, stating the work to be done or omitted, and the amount of money required in such changes or alterations, whether the same should be in the nature of additions or deductions, and therein stating the work in particular and signed by the respective parties, and the price of such alterations should be the real and true value of the work and materials added or deducted. * * *

It is next claimed by appellee that he furnished and laid up twenty-two thousand bricks in the towers of the building, not embraced in the plans and specifications. This item might well be left to rest upon the same grounds as the last one. It appears from the evidence, however, that when the contract was signed the detailed drawings of the towers were not present, and so were not made a part of the contract. When these detailed drawings arrived, appellee claims they showed seven feet of brick wall to be laid above the cornices, not shown or in any manner indicated in the drawings signed by the parties. For this work and the bricks therefor he charges two hundred and forty-four dollars extra.

The exterior confirmation of the building was plainly shown on the drawings embodied in the contract and should have apprised the contractors, as practical builders, of the usual requirements of such structures. Having commenced the work without detailed drawings or working plans of the tower, it was their duty, if on arrival these detailed drawings showed anything unusual, to have made their objections before doing the work, and to have had the decision of the superintendent upon the same. There is some slight evidence that one of them did call the attention of the superintendent to the fact, but not in such a way as to amount to an objection to doing the work under the contract, or a demand for a decision upon a disputed point. Ap-

pellants were never asked to insert this work as an extra into the contract, nor until after the work was done and about to be settled for under the contract, was any claim made for payment therefor.

The contract substantially provided that the contractors should furnish all labor and materials to finish and complete the brick work without any extra charge, and if changes should be made they should be specified in writing, and the amount of increase or decrease of cost specified. There can, therefore, be no claim sustained for extras except such as are specified in the writing, unless it can be shown that appellants had waived this provision.

This latter claim cannot therefore be allowed. * * *

Judgment reversed.²

(3) *Strikes, Fires, and Breakage of Machinery as Express Conditions*

"* * * It is further agreed that performance of this contract by the contractor is subject to strikes, fires, floods, and other similar and dissimilar causes beyond the control of the contractor."

NEW ENGLAND CONCRETE CONST. CO. v. SHEPARD & MORSE LUMBER CO.

Supreme Judicial Court of Massachusetts, 1915. 220 Mass. 207, 107 N.E. 917.

[Action by the New England Concrete Construction Company against the Shepard & Morse Lumber Company. Plaintiff excepts to certain rulings of the trial judge. Exceptions overruled.]

CROSBY, J. The contract upon which this action is brought arises from certain letters and an "order slip" delivered to the

² Though a written order is made a condition to recovery for extra work, no formality is required as to the writing. So in Lantry Contracting Co. v. Atchison, T. & S. F. Ry. Co., 102 Kan. 799, 172 P. 527 (1918), where the chief engineer orally or-

dered the extra work and submitted a blueprint to the contractor directing how it should be done, it was held that the blueprint as furnished was sufficient to meet the requirement that extra work must be done under a written order.

plaintiff by the defendant. By the terms of the contract the defendant agreed to manufacture and furnish the plaintiff 58,000 feet of No. 1 maple flooring, in accordance with certain specifications, for the sum of \$37.50 per thousand, delivered at Salem, Massachusetts. * * *

The contract contained a further provision that: "All contracts are contingent upon strikes, fires, breakage of machinery, perils of navigation and all other causes beyond our control." The evidence shows that on February 19, 1913, and before any of the flooring had been manufactured or delivered to the plaintiff the defendant's mill at Burlington was destroyed by fire; that the defendant duly notified the plaintiff by letter of that fact and of its inability for that reason to carry out the contract.

The agreement is not an absolute contract by which the defendant agreed to furnish the flooring to the plaintiff, but was subject to certain conditions, including the condition that the contract was contingent upon fires; that is to say, the defendant was excused from performance in the event of the happening of any of the contingencies set forth in the contract. *Davis v. Columbia Coal Mining Co.*, 170 Mass. 391, 49 N.E. 629.

The effect of this clause was not to extend the time of performance beyond the time limit, but wholly to relieve the plaintiff from the obligation to furnish the flooring called for by the contract. *Metropolitan Coal Co. v. Billings*, 202 Mass. 457, 89 N.E. 115. * * *

There was evidence to show that the defendant was a lessee of its mill in Burlington which its lessor was under no legal obligation to rebuild after the fire; that the defendant had no other mill where the flooring could have been manufactured, and that it could not have been furnished to the defendant, had the mill been rebuilt, until the latter part of June, 1913.

Whether the contract is to be construed as requiring the defendant to deliver the flooring about June 1st, or "as required probably shortly after June 1st," we are of opinion that upon all the evidence it could have been found that time was an essential part of the contract and was so contemplated by the parties; and the judge was warranted in finding that by reason of the destruction of the mill by fire it was impossible for the

defendant to perform the contract according to its terms. *Pickering v. Greenwood*, 114 Mass. 479.

We perceive no error in the manner in which the presiding judge dealt with the requests for rulings, and are of opinion that the finding was warranted.

Exceptions overruled.

UNITED STATES v. BROOKS-CALLAWAY CO.

Supreme Court of the United States, 1943.
318 U.S. 120, 63 S.Ct. 474, 87 L.Ed. 653.

Suit in the Court of Claims by the Brooks-Callaway Company against the United States to recover a sum which was deducted from the contract price as liquidated damages for delay in the completion of a contract for the construction of levees on the Mississippi River. To review a judgment for the plaintiff, the defendant brings certiorari.

Reversed and remanded.

Mr. Justice MURPHY delivered the opinion of the Court.

We are asked to decide whether the proviso to Article 9 of the Standard Form of Government Construction Contract³ which provides that a contractor shall not be charged with liquidated damages because of delays due to unforeseeable causes beyond the control and without the fault of the contractor, including floods, requires the remission of liquidated damages for delay caused by high water found to have been customary and foreseeable by the contracting officer.

³ In general Article 9 gives the Government the option of terminating the contractor's right to proceed, or of allowing him to proceed subject to liquidated damages if he fails to proceed with diligence or to complete the work in time. The full text of the proviso is:

"* * * Provided, That the right of the contractor to proceed shall not be terminated or the contractor charged with liquidated damages be-

cause of any delays in the completion of the work due to unforeseeable causes beyond the control and without the fault or negligence of the contractor, including, but not restricted to, acts of God, or of the public enemy, acts of the Government, fires, floods, epidemics, quarantine restrictions, strikes, freight embargoes, and unusually severe weather or delays of subcontractors due to such causes: * * *."

Respondent brought this suit in the Court of Claims to recover the sum of \$3,900 which was deducted from the contract price as liquidated damages for delay in the completion of a contract for the construction of levees on the Mississippi River. The contract was not completed until 290 days after the date set, and liquidated damages in the amount of \$5,800 (figured at the contract rate of \$20 for each day of delay) were originally assessed. Respondent protested, and upon consideration the contracting officer found that respondent had been delayed a total of 278 days by high water, 183 days of which were due to conditions normally to be expected and 95 of which were unforeseeable. He recommended that liquidated damages in the amount of \$1,900 (representing 95 days of unforeseeable delay at \$20 per day) be remitted and that the balance of \$3,900 be retained. Payment was made on this basis.⁴

The Court of Claims held that liquidated damages should not have been assessed for any of the 278 days of delay caused by high water because the high water was a "flood" and under the proviso all floods were unforeseeable per se. * * *

We believe that the construction adopted below is contrary to the purpose and sense of the proviso and may easily produce unreasonable results. The purpose of the proviso is to remove uncertainty and needless litigation by defining with some particularity the otherwise hazy area of unforeseeable events which might excuse non-performance within the contract period.
* * *

* * * * Not every fire or quarantine or strike or freight embargo should be an excuse for delay under the proviso. The contract might be one to excavate for a building in an area where a coal mine had been on fire for years, well known to everybody, including the contractor, and where a large element of the contract price was attributable to this known difficulty. A quaran-

⁴ The contracting officer found that the remaining delay of 12 days (the difference between the total delay of 290 days and the 278 days due to high water) was not excusable, as claimed by respondent, on account of the Government's failure to secure a necessary right of way, or on ac-

count of the requirement by the contracting officer that respondent build a tie-in levee. On these points the court below sustained the conclusions of the contracting officer. Respondent has not appealed and this phase of the case is not before us.

tine, or freight embargo, may have been in effect for many years as a permanent policy of the controlling government. A strike may be an old and chronic one whose settlement within an early period is not expected. In any of these situations there could be no possible reason why the contractor, who of course anticipated these obstacles in his estimate of time and cost, should have his time extended because of them.

"The same is true of high water or 'floods'. The normally expected high water in a stream over the course of a year, being foreseeable, is not an 'unforeseeable' cause of delay. Here plaintiff's vice-president testified that in making its bid plaintiff took into consideration the fact that there would be high water and that when there was, work on the levee would stop. * * *

We intimate no opinion on whether the high water amounted to a "flood" within the meaning of the proviso. Whether high water or flood, the sense of the proviso requires it to be unforeseeable before remission of liquidated damages for delay is warranted. The contracting officer found that 183 days of delay caused by high water were due to conditions normally to be expected. No appeal appears to have been taken from his decision to the head of the department, and it is not clear whether his findings were communicated to respondent so that it might have appealed. The Court of Claims did not determine whether respondent was concluded by the findings of the contracting officer under the second proviso to Article 9, and not having made this threshold determination, of course made no findings itself as to foreseeability. We think these matters should be determined in the first instance by the Court of Claims. Accordingly the judgment is reversed and the cause remanded with instructions to determine whether respondent is concluded by the findings of the contracting officer, and, if not, for a finding by the court whether the 183 days of high water or any part of that time were in fact foreseeable. * * *

(4) *Architect's Certificate as Express Condition Precedent*

"* * * Upon the completion of all the work included in this contract, the architect will certify to that effect. The said contractor further agrees that he shall not be entitled to demand or receive

final payments for any portion of the aforesaid work or materials until all the stipulations and conditions hereinbefore mentioned are complied with and the said architect shall have given his certificate to that effect."

Where a building contract states that the amount agreed to be paid the building contractor by the owner shall not be payable until approval by a certain architect, if the approval of the architect is arbitrarily, dishonestly, fraudulently, or capriciously withheld, the court will ordinarily allow recovery upon proof of the completion of the work by the contractor according to contract, without the architect's certificate of approval; but, if the contract states that the architect's decision shall be final and conclusive, the court will enforce this stipulation, if there be no bad faith or fraud on the part either of the architect or of the party setting up the architect's decision.

BADGER v. KERBER.

Supreme Court of Illinois, 1871. 61 Ill. 328.

This suit was brought to recover the contract price for the cut stone used in building defendant's * * * house. The stone was white and clear when used, but, by exposure to the weather, small particles of iron which it contained oxidized and colored the stone, and defendant refused to pay the last installment on the contract [and pleads the prior breach by plaintiff of failure to secure the certificate of the superintendent of construction, by the contract made an express condition precedent to defendant's duty thereon].

Mr. Justice THORNTON. * * * The contract provided that the material used and the work done should be paid for upon the certificate of the superintendent, who was selected by the parties and was named in the written agreement. Stone was to be furnished and the work completed to the satisfaction of the superintendent.

The kind of stone contracted for was used, and there is no complaint of the character of the work. There was some discoloration of the stone after it was placed in the building, and for this

reason only the superintendent refused to give a certificate for the amount sued for.

There is evidence in the record that the contractor bid with reference to the identical stone used, and that it was recommended by the superintendent. He had a sample of it in his office at the time of the contract, and had also given certificates for more than half of the contract price, as the work progressed. * * *

The provision in the contract in regard to the stone is as follows: "The contractor must furnish a first rate quality of stone, in every particular sound, and of uniform color for the light colored Cleveland sand stone, or the Columbia stone." The Columbia stone was used. Its soundness and quality are not questioned. The contractor based his bid upon its use, and the superintendent not only recommended it, but had used it in another building during the previous year.

The refusal to give the certificate, under the circumstances, was bad faith in the superintendent. The contractor had fully complied, and was entitled to the value of his materials and labor, according to the price agreed upon.

The modifications of appellant's instructions were proper. They substantially informed the jury that the superintendent must act in good faith in his relations to the parties, and that if he refused to deliver a certificate, in bad faith and fraudulently, then the contractor must recover upon performance.

Performance by him, as well as the fraudulent conduct of the superintendent, were fairly submitted to the jury, accompanied with proper instructions. They have determined these matters from the evidence, and we shall not disturb the finding.

The superintendent should have exercised his power with reasonable discretion, and not capriciously. If he acted fraudulently, and ought to have been satisfied with the work and material, and so the jury have found, and rightly, then the judgment should not be reversed. *Baker v. Jones*, 2 Car. & Kir. 742; *Mills v. Weeks*, 21 Ill. 561; *McAuley v. Carter*, 22 Ill. 53.

The judgment is affirmed

Judgment affirmed.

(5) Warranties by Builder

A specific warranty by the builder that the structure when completed shall achieve a stated result, such as that it shall be water-proof or fireproof, operates as a condition to the owner's duty to make final payment where the defect warranted against appears before such payment is made. Where the defect appears after final payment, the owner's remedy is money damages in an amount necessary to accomplish the warranted result.

MacKNIGHT FLINTIC STONE CO. v. MAYOR, ALDERMEN
AND COMMONALTY OF CITY OF NEW YORK.

Court of Appeals of New York, 1899. 160 N.Y. 72, 54 N.E. 661.

[Action by the MacKnight Flintic Stone Company against the Mayor, Aldermen and Commonalty of the city of New York to recover on a contract. From a judgment of the Appellate Division of the Supreme Court, affirming a judgment dismissing the complaint upon the merits (31 App.Div. 232, 52 N.Y.S. 747), plaintiff appeals. Plaintiff entered into a contract with the city of New York to erect a courthouse and prison according to certain plans and specifications furnished by it. The plans were designed for the accomplishment of certain results in the exclusion of water from the cellar to be floored and walled by plaintiff, which were below tide level. The contract provided for the quantity and quality of material to be used; that it should be installed under the direction and supervision of the city engineers; that the engineers might alter the specifications in a manner not materially affecting their substance in order more fully to carry out the work contemplated; "that the work was to be turned over to the city by the contractor in perfect order, and guaranteed absolutely water and damp proof for five years from the date of acceptance of the work, any dampness or water breakage within that time to be made good by contractor." Plaintiff used the material called for in the specification, both as to quantity and quality, under the direction of the city engineers and the latter made no objection either to material or method of construction, and the contractor complied with the contract and specifications in every particular.]

VANN, J. The main question presented for decision is whether the plaintiff can recover without making the floor of the boiler room absolutely waterproof, even if it has conformed in every respect to the plan and specifications. The plaintiff insists that it has fully performed the contract, because it has furnished all the materials of the quality required, and has done all the work called for by the plan and specifications, while the defendant insists that performance is not complete, because the plaintiff warranted that the plan and specifications, when carried into effect, would result in a waterproof boiler room, and that the boiler room is not waterproof.

While the evidence would not compel, it would support a finding that the contract has been fully performed, unless the plaintiff guaranteed the sufficiency of the plan and specifications to produce absolute waterproof construction. The form of its promise was to furnish "the materials and labor for the purpose, and make water-tight the boiler room etc. * * * in the manner and under the conditions * * * set forth in the annexed specifications," and that it would turn the work over to the city "in perfect order, and guaranteed absolutely water and damp proof for five years from the date of the acceptance of the work"; any dampness or water breakage within that time to be made good by the contractor without expense to the city. If this means that the plaintiff agreed to make the boiler room water tight by following the plan and specifications, even if it could not be done in that way, it agreed to perform an impossibility, as the jury might have found. If, on the other hand, the meaning is that it agreed to make the boiler room water-tight by following the plan and specifications, provided it could be done in that way, it has performed its contract, as we must assume for the purpose of this appeal.

The rule of reasonable construction governs courts in the enforcement of contracts. The contract now before us does not necessarily require the construction that the plaintiff guaranteed the sufficiency of the plan and specifications to produce the result desired, because it does not in terms so provide. There is no independent or absolute covenant to that effect. There is nothing in the subject of the contract, the situation of the parties, or the language used by them, to conclusively indicate such an intention, and a fair and reasonable construction avoids such a

peculiar and unjust result. The agreement is not simply to do a particular thing, but to do it in a particular way, and to use specified materials in accordance with the defendant's design, which is the sole guide. The promise is not to make water-tight, but to make water-tight by following the plan and specifications prepared by the defendant, from which the plaintiff had no right to depart, even if the departure would have produced a water-proof cellar. * * *

[As to the five-year guaranty clause wherein] the plaintiff agreed to turn the work over "in perfect order and guaranteed absolutely water and damp proof for five years," and to make good any dampness or water breakage during that period, this as we think applies to the material and workmanship, but not to the plan. It has reference to what the plaintiff was to do, not to what the plan would accomplish, and is predicated on the efficiency of the plan. The plaintiff was to execute the work according to the plan, and to turn it over in perfect order, but, to guard against latent defects, he was required to protect the defendant against them for the period named. * * *

We think the evidence presented a question of fact for the jury as to the sufficiency of the plan to produce the result desired, and as to performance of the contract when properly construed. If the work was faithfully performed according to the plan and specifications, and the failure to secure a water-tight boiler room was wholly owing to the defective design of the defendant, the plaintiff would be entitled to recover, notwithstanding the refusal of the superintendent to give the required certificate, for under those circumstances it would be his duty to give it, and a refusal to do so would be unreasonable. Gowery Nat. Bk. v. Mayor, etc., of City of New York, 63 N.Y. 336; Nolan v. Whitney, 88 N.Y. 648; Thomas v. Stewart, 132 N.Y. 580, 30 N.E. 577.

The judgment should be reversed, and a new trial granted, with costs to abide the event. All concur, except GRAY, J., dissenting. Judgment reversed, etc.

BARRAQUE v. NEFF.

Supreme Court of Louisiana, 1942. 202 La. 360, 11 So.2d 697.

O'NEILL, C. J. This is a suit against a contractor and the surety on his bond for the cost of remedying defects in a building which was constructed for the plaintiff. The judge of the district court, after hearing the evidence, rejected the plaintiff's demand. She is appealing from the judgment.

The testimony leaves no doubt that the defects complained of—consisting mainly of cracks and leaks in the walls of the building—appeared within a very short time—and had developed into very serious defects within a year—after the building was completed. And it is virtually conceded that the cause of the cracks and leaks was that the walls were made of a very porous material, called super-rock, which absorbed too much moisture. Super-rock is a composition of cement and cinders, molded into building blocks. It was something new in Shreveport at the time when this contract was entered into; hence the contractors and builders there generally were not well informed of the fitness of super-rock for the construction of the walls of buildings in this climate. The evidence indicates that super-rock is perhaps suitable for the construction of the walls of buildings if they are waterproofed permanently by an outside finish. But in this instance the walls were finished in stucco and the absorption of moisture after hard rains, and the expansion and contraction of the super-rock, caused the walls to crack in many places and to let in the moisture to such an extent that the inside plastering was badly blemished. The consequence was that the house was hardly tenable, until the owner had the house brick-veneered, and had it renovated inside and out.

The plaintiff bases her suit upon certain clauses in the contract which required that the contractor should provide and pay for the materials and labor and that the workmanship and materials should be of good quality. But the suit is founded particularly upon the following clause in the contract: "The Contractor shall re-execute any work that fails to conform to the requirements of the contract and that appears during the progress of the work, and shall remedy any defects due to faulty materials or workmanship which appear within a period of one year from the date of completion of the contract." [The italics are ours.]

According to that clause, the contractor was not only obliged to re-execute any work that failed to conform with the plans and specifications—or with the so-called “requirements of the contract”—and that so appeared during the progress of the work—but he was obliged also to remedy any defect due to faulty material or workmanship if any such defect appeared within a year after the completion of the building. There is no doubt that the defects in this case, which appeared within the year after the completion of the building, were due to faulty material or workmanship, because the using of super-rock without waterproofing the walls proved to be faulty construction. The question therefore is whether the mistake of using super-rock, in the way in which it was used, is attributable to the contractor or to the plaintiff. The defendants plead that the use of super-rock for the construction of the walls was specified in the contract, and that the work was done under the supervision of a competent and experienced building inspector employed by the plaintiff. The defendants contend that the building was completed in a workmanlike manner, and they aver that the cracks and leaks in the walls were caused either by the expansion and contraction of the super-rock or by the settling of the building because of defects in the soil. The evidence shows conclusively that there was no defect in the soil, no unusual settling of the walls, and shows that the cracks and leaks in the walls were caused entirely by absorption of moisture and by expansion and contraction of the super-rock. Our opinion is that the contractor is the one who is responsible for the mistake of using super-rock as it was used in this instance. Mrs. Barraque knew nothing about super-rock before the contractor suggested and recommended it. She desired brick-veneered walls, and was very reluctant in accepting the contractor's recommendation of super-rock. He designed the building, drew the plans and specifications, and prepared the contract for Mrs. Barraque's signature. She had no architect to advise her or to supervise the construction of the building. The inspector whom she employed was regularly employed as a building inspector for a building and loan association; and his duties in this instance, as he understood them and described them in his testimony as a witness for the defendants, consisted merely of seeing that the construction of the building was being done according to the terms of the contract. He acknowledged in his testimony that if the building

and loan association had intended to make a loan on the building he would have recommended furring between the super-rock walls and the plastering inside of the building. And when he was asked why he did not make that recommendation for the benefit or protection of Mrs. Barraque he replied that it was not required by the contract for the construction of the building. He made it very plain that his employment was merely to see that the work was being done according to the specifications of the contract, and that he was not employed to advise Mrs. Barraque with regard to any unforeseen consequence of the method or material with which the work was done. The doctrine that a contractor is not responsible for unforeseen and unfavorable consequences of work which he does in conformity with plans and specifications furnished him by the party for whom the work is done, or by an architect employed by such party, is not applicable to the facts of this case. Mrs. Barraque did not, by consenting to the use of super-rock for the construction of the walls of her building, or by employing an inspector to inspect the work as it progressed, abandon her right to depend upon the contractor's guaranty that he would remedy any defect that might result from faulty materials or workmanship and that might appear within a year after the completion of the building. * * *

The only remaining question is what amount the plaintiff should recover. It cost her \$1,563 to have the brick-veneering done, and to reinforce the foundation so that it could sustain the additional weight, and to do the other work that was rendered necessary by the veneering of the house, that is, to remove and replace the back stairs and the electric and gas meters and the cornices above the walls. It cost her also \$365 to repaint the building inside and out; all of which was made necessary by the cracks and leaks in the walls, and by the brick-veneering of the building. When Mrs. Barraque made her last payment on the contract price she retained \$44. This, of course, must be deducted from the \$1,928 of expense which she afterwards incurred, leaving a balance of \$1,884, which she is entitled to recover. * * *

(6) *Time as an Express Condition Precedent*

"* * * It is further agreed that time shall be of the essence of this contract."

ADAMS et al. v. GUYANDOTTE VALLEY RY. CO. et al.

Supreme Court of Appeals of West Virginia, 1908. 64 W.Va. 181, 61 S.E. 341.

Bill to cancel a contract by P. C. Adams and others against the Guyandotte Valley Railway Company and another. Decree for defendants, and complainants appeal.

POFFENBARGER, P. * * * The [plaintiff] landowners agreed to * * * lease * * * for coal-mining or coal-coking purposes any part of the land that lies upon or is drained by the stream emptying into the Guyandotte river to any party or parties presented by the railway company or its assigns, with all such privileges as are necessary and proper for the conduct of mining operations. * * * The covenants and conditions imposed upon the railway company were two in number, only the first of which is important, which reads as follows: "It will cause the said railway to be commenced within one year and completed and in operation opposite the said lands of the parties of the first part by the 1st of January, 1903; and it is understood that, if the said railway is not completed and in operation by the said date, this agreement shall no longer be binding upon the parties hereto." * * *

Failure of the railway company to comply with the condition having been shown, the propriety of the remedy invoked by the plaintiff is dependent upon the character of that condition. * * * If it is a condition precedent, one which it was incumbent upon the railway company to perform before any interest, right, title or estate vested or could vest, * * * equity has jurisdiction to cancel the contract by way of removing a cloud from the title to the land, if it constitutes a cloud thereon. * * * That failure to perform a condition precedent prevents the vesting of title or right is elementary law. * * *

No authority need be cited for the proposition that the completion and operation of the railroad opposite the land is a condition precedent. * * * That was the substance of the thing which

it was stipulated the railway company should do. It constituted the whole consideration. * * * The only matter about which there could be a doubt is whether time is made an essential part of the condition. In the construction of contracts this is often a perplexing inquiry, but the doubt generally arises in those instances in which the parties have not, by any express term of the contract, indicated the essentiality of the time specified. Then resort must be had to the nature of the [contract], its subject-matter, the evident purpose had in view, the prior and subsequent conduct of the parties, and the immediate context of the phrase or clause specifying time. The form and legal effect of the stipulation also have important bearing upon the question. In such cases, the inquiry is for the intention of the parties, and it must be gathered from the whole instrument and the surrounding circumstances. * * *

Under the practically unlimited right and power of parties to make such contracts as they see fit to make, and bind themselves to such extent and in such manner as they please, they may make performance of any covenant or condition, however unimportant or trivial in character, a condition precedent. Though time of performance may be comparatively or really unimportant in a practical sense, they have the power to stipulate with one another that failure to observe it shall be fatal and put an end to the contract. * * *

[In the present case the parties] have solemnly said in their written agreement, not only that the road should be completed and operated opposite the land, but also that it should be completed and operated by the 1st day of January, 1903, and that failure to comply within that time should put an end to the contract. In this final clause the date of completion is referred to as well as the requirement of completion. * * * Our conclusion is that, by the express terms of the contract, time is made of the essence thereof. As the road was not built within that time, no title vested, nor can it ever vest under this contract. Wherefore the agreement now amounts to nothing more than a cloud upon the title of the plaintiffs, and the court should have canceled it as such. * * *

(B) IMPLIED CONDITIONS PRECEDENT

Even where the parties have not expressly declared that the performance of a particular term is to be regarded as a condition to the other's liability, yet, if it so appears from the whole contract and from the surrounding circumstances that they so intended it to be, such performance of such term will be regarded as a condition by implication.

We have seen, in the preceding section, that, where the parties have specifically stated that the performance of some term of the agreement is one of the important things bargained for, the *essence* of the contract, the strict performance of that term is an *express* condition precedent to further liability thereunder. But, even where the parties have not so stated their intention, the court may nevertheless find implied in the agreement and the surrounding circumstances the clear intention that the performance of some term is the particular thing contracted for. The breach of such a term is the breach of an *implied* condition precedent.

Breaches of contract are of four classes:

(1) The material breach of a material term. This amounts to the breach of a condition precedent. Note that not only must the term be material, but also the breach must be serious, in order that a discharge of the contract may be effected. The court must be able to say that the aggrieved party has not secured what he bargained for.

(2) The immaterial breach of a material term. If the breach be slight or unimportant, the performance will be substantially if not literally what was bargained for; and a substantial performance in good faith by one party justifies performance on the part of the other, giving him no more than a right to damages for the breach.

(3) The material breach of an immaterial term. Here also the breach still leaves substantial performance. If the term broken was not the "essence" of the contract, if it was not the condition upon which the other party's obligation depended, then the breach of such a term ought only to give him a right to damages,

and not the additional right to renounce his obligation under the contract.

(4) **The immaterial breach of an immaterial term.** Here is the next thing to strict performance. Very clearly such a breach would leave so substantial a performance that the damages would be nominal.

PITTSBURGH PLATE GLASS CO. v. AMERICAN SURETY CO.

Court of Appeals of Georgia, 1942. 66 Ga.App. 805, 19 S.E.2d 357.

SUTTON, J. The plaintiff entered into a contract with Henry C. Beck, trading as Central Contracting Company, to furnish certain glass, glazing, and glass block and install in buildings which he was constructing for the State Hospital Authority of Georgia at Milledgeville, Georgia, and for the Public Works Administration at Fort Benning, Georgia. According to the petition the work was done, the general contractor, Beck, secured the acceptance and approval of the architects and was paid, and he paid the plaintiff except as to a balance of \$3,657.26, to recover which suit was brought against the defendant surety, under the provisions of Code, § 23-1708, on a bond executed by Beck as principal. The petition attaches as exhibits the relevant portion of the contract under which Beck operated and the subcontract into which he entered with the plaintiff, and the question here presented is whether or not, under the allegations of the petition as amended, the trial court erred in sustaining the defendant's general demurrers and in dismissing the petition.

While the subcontract refers to the plans and specifications mentioned in the contract under which Beck, the general contractor, operated, the plaintiff contends that such reference was merely for the purpose of showing the character, quality, sizes, etc., of the glass and glass block ordered from it by Beck, and that the general contract became a part of the subcontract only for such particular and limited purpose. The defendant contends that the petition and exhibits show that the plaintiff undertook to do for the contractor, in respect to the materials ordered and the installation thereof, what the contractor was obligated to do for the State Hospital Authority and the Public Works Administration in the construction of the specified buildings, that the

plaintiff's contract with the general contractor was an entire one, and that it breached the contract by failing to clean and have clean, before final inspection, the glass it had installed and also to obtain from Robert & Company, architects and engineers, acceptance and approval of the work, and, therefore, was not entitled to recover. The plaintiff avers that its subcontract did not require that it clean the glass and that it properly declined to do so at the request of the general contractor, and that, though required originally to obtain from the architects and engineers acceptance and approval of its work, the general contractor waived its obligation by himself obtaining such acceptance and approval.

It appears from the petition that under the subcontract with Beck the plaintiff agreed to furnish specified materials and install the same in certain buildings being constructed by Beck at the Milledgeville State Hospital (as to which it is agreed by both parties that the alleged balance on account applies exclusively) "in strict accordance and compliance with the plans and specifications of Robert & Company, architects and engineers for the Milledgeville State Hospital", and that "all of the materials furnished under this order shall be subject to the approval of Robert & Company, architects and engineers, and is more specifically called for in the specifications under section 5, pages 1 to 14, inclusive, for the Milledgeville work; and also under section 22, pages 1 to 2, inclusive, for the Milledgeville work; and is more specifically called for in the specifications prepared by the War Department for Fort Benning. You are to furnish and secure the approval of the architects and engineers on all glass and glass block for Milledgeville, and you are to furnish and secure the approval of the construction quartermaster on all glass for Fort Benning, page 65. This order shall cover a complete job of glass and glazing for Milledgeville and Fort Benning, whether shown on the plans or called for in the specifications or in both." (Then followed statement of a lump sum to be paid for all work.) In section 22, item 1 of the general contract, referred to in the subcontract, it was provided: "All glass required by the contract shall be furnished and installed complete. The glass shall be carefully cleaned, and any glass that has been broken, cracked, scratched, or otherwise damaged by work under this contract shall be replaced with new glass. All glass shall be clean and sound at the time of final inspection."

It is the general rule, as stated in 9 Am.Jur. 11, § 11: "It is generally held that where a building contract refers to the plans and specifications and so makes them a part of itself, the contract is to be construed as to its terms and scope together with the plans and specifications. The specifications are but the particulars or details of the plan, and the term 'plan' fairly embraces the specifications for the buildings. Where the plans and specifications are by express terms made a part of the contract, the terms of the plans and specifications will control with the same force as though incorporated in the very contract itself. Where, however, the plans and specifications are referred to in the contract for a particular specified purpose, such specifications can serve no other purpose than the one specified, and are foreign to the contract for all other purposes. In the absence of express provision in the contract, the specifications can neither restrict nor extend the scope of the contract to subjects other than those covered by the contract." While the subcontract did not by express terms make the general contract a part of itself, we think that the reference to the plans and specifications of the general contract, though not embracing all of the obligations of the general contractor, does not merely serve the limited purpose of requiring the furnishing and installing specified material, as contended by the plaintiff in error, but comprehends that such material and work, on final inspection, should have the approval of Robert & Company, the architects and engineers. It is manifest that no acceptance and approval could reasonably be expected if any of the glass, etc., should be found to be "broken, cracked, scratched, or otherwise damaged" or not cleaned, and the petition shows that after the initial installation of such material the work, because of acts of other subcontractors, was left in a condition which did not merit the approval of the architects and engineers; that the general contractor called upon the plaintiff to clean the glass so that such approval could be obtained, but that the plaintiff, conceiving that it had done in the first instance all that was required of it, refused to put the glass in a condition meriting approval of the designated agency; that it became necessary for the general contractor to remedy this deficiency, and, having done so, to obtain the requisite approval. The subcontract did not merely call for the furnishing and installation of glass, etc., but required that the plaintiff furnish all necessary glass,

etc., whether shown in the plans and specifications or not, that is "a complete job," and as "more specifically called for" in the plans and specifications of the general contract. Under section 22, item 1, any glass called for would have to be glass which, at final inspection, was not found to be damaged or in need of cleaning, and we think that the plaintiff undertook to have such glass, at final inspection, in a condition warranting approval of the architects and engineers and to obtain that approval and acceptance of the work. It is shown, as above stated, that other subcontractors, plasterers, etc., rendered the original work of the plaintiff such that some replacement and cleaning became necessary for final approval and acceptance by the architects and engineers. The plaintiff, after due notice and request by the general contractor, refused to properly clean the glass. It became necessary, therefore, for the general contractor to do what the plaintiff was obligated to him to do, and in so doing he could not reasonably be said to have waived, as contended by the plaintiff in error, any duty resting upon the plaintiff. The contract was plainly an entire one. The petition shows that it was breached by the plaintiff in that it failed to clean the glass and to obtain from the designated architects and engineers the acceptance and approval of its work. Consequently, the plaintiff was not entitled to maintain an action on it against the general contractor or to bring the present suit against his surety on his bond. The trial court did not err in sustaining the defendant's general demurrers and in dismissing the petition as amended. * * *

(1) Time as an Implied Condition

Stipulations as to the time of a contract are not of the essence of the contract if it does not clearly appear that the parties intended to make performance of a stipulated act by a party within the time fixed a condition precedent to its enforcement by such party. If it does not appear that the parties intended time to be of the essence of the contract, a brief delay in performance by either party after the time specified does not justify the aggrieved party in refusing to perform; but, in such a case, the only remedy of the aggrieved party will be an action for damages suffered by reason of the breach of contract, or a counterclaim for such damages in an action brought by the other party. The parties may stipulate that time is of the essence.

Where the performance by one party to a contract by a specified date is not made a condition to the other party's continued liability by express stipulation, it may nevertheless be held to have been so intended from the nature of the contract. In contracts for the sale of goods, it is generally held that time is of the essence; and, where a term of the contract provides for the date of shipment or delivery, such act on the seller's part will usually be regarded as a condition precedent, on the failure of which the other party may repudiate the whole contract. In contracts for the sale of land, or for the performance of services, or the construction of buildings and the like, generally time will not be implied as of the essence unless it clearly appears that the parties must have so intended it.

BECK & PAULI LITHOGRAPHING CO. v. COLORADO
MILLING & ELEVATOR CO.

Circuit Court of Appeals of the United States, Eighth Circuit, 1892.
52 F. 700, 3 C.C.A. 248.

SANBORN, Circuit Judge. The ground on which it is sought to sustain the instruction of the court below to return a verdict for the defendant in this case is that the plaintiff failed to tender or deliver the articles contracted for to the defendant, at Denver, until six or eight days after the expiration of the year, that the plaintiff did not therefore furnish them "in the course of the year," and that this failure justified the defendant in repudiating the contract, and refusing to pay any part of the contract price.

It is a general principle governing the construction of contracts that stipulations as to the time of their performance are not necessarily of their essence, unless it clearly appears in the given case from the express stipulations of the contract or the nature of its subject-matter that the parties intended performance within the time fixed in the contract to be a condition precedent to its enforcement, and, where the intention of the parties does not so appear, performance shortly after the time limited on the part of either party will not justify a refusal to perform by the party aggrieved, but his only remedy will be an action or counterclaim for the damages he has sustained from the breach of the stipulations. In the application of this principle to the cases as they have arisen, * * * the controlling consideration has been, and ought to be, to so decide and classify the cases that unjust

penalties may not be inflicted, nor unreasonable damages recovered. Thus, in the ordinary contract of merchants for the sale and delivery, or the manufacture and sale, of marketable commodities within a time certain, it has been held that performance within the time is a condition precedent to the enforcement of the contract, and that a failure in this regard would justify the aggrieved party in refusing performance at a later day. * * *

This application of the general principle commends itself as just and reasonable, on account of the frequent and rapid interchange and use of such commodities made necessary by the demands of commerce, and because such goods, if not received in time by the vendee, may usually be sold to others by the vendor at small loss, and thus he may himself measure the damages he ought to suffer from his delay by the difference in the market value of his goods. On the other hand, it has been held that an express stipulation in a contract for the construction of a house, that it should be completed on a day certain, and that, in case of failure to complete it within the time limited, the builder would forfeit \$1,000, would not justify the owner of the land on which the house was constructed in refusing to accept it for a breach of this stipulation when the house was completed shortly after the time fixed, nor even in retaining the penalty stipulated in the contract, but that he must perform his part of the contract, and that he could retain from or recover of the builder the damages he sustained by the delay and those only. * * * This application of the general rule is equally just and reasonable. The lumber and material bestowed on a house by a builder become of little comparative value to him, while they are ordinarily of much greater value to the owner of the land on which it stands, and to permit the latter to escape payment because his house is completed a few days later than the contract requires would result in great injustice to the contractor, while the rule adopted fully protects the owner, and does no injustice to any one. The cases just referred to illustrate two well-settled rules of law which have been deduced from this general principle, and in accordance with which this case must be determined. They are:

In contracts of merchants for the sale and delivery or for the manufacture and sale of marketable commodities a statement descriptive of the subject-matter, or some material incident, such as the time of shipment, is a condition precedent, upon the failure

or nonperformance of which the party aggrieved may repudiate the whole contract. * * * But in contracts for work or skill, and the materials upon which it is to be bestowed, a statement fixing the time of performance of the contract is not ordinarily of its essence, and a failure to perform within the time stipulated, followed by substantial performance after a short delay, will not justify the aggrieved party in repudiating the entire contract, but will simply give him his action for damages for the breach of the stipulation. * * *

The contracts in the case we are considering were not for the blank paper on which they were finally impressed; that was of small value in proportion to the value of the finished articles; they were not for the sale of anything then in existence; they were for the artistic skill and labor of the employees of the defendant in preparing the sketches and designs, transferring them upon stone, and finally impressing them upon the paper the defendant was to furnish; and they authorized the plaintiff, without other orders than the contracts themselves, and the approvals of the designs and proofs there called for, to prepare and furnish all the articles named in the contracts and to collect the contract price therefor. These contracts required the names of defendant's mills and its trade-marks to be so impressed upon all these articles that when they were completed they were not only unsalable to all others, but worthless to plaintiff for all purposes but waste paper. The contracts are evidence that on December 31, 1889, the articles contracted for would have been worth about \$6,000 to the defendant, and if a few days later, when they were tendered, they were not worth so much, the defendant may recover the damages it suffered from the delay from December 31, 1889, to the date of the tender, in a proper action therefor, or may have the same allowed in this action under proper pleadings and proofs, and no injustice will result; while, if the defendant was permitted on account of this delay to utterly repudiate the contract, the plaintiff must practically lose the entire \$6,000.

The contracts contain no stipulation from which it can be fairly inferred that the parties intended the time of performance to be even material. * * * In the absence of any such stipulation, or any clearly-expressed intent that time should be material even, it would be clearly unjustified by the law and inequita-

ble to hold that the plaintiff is compelled to forfeit his entire contract price on account of this trifling delay that may have been immaterial to the defendant, and, if not, may be fully compensated in damages.

The result is that these contracts were not for the sale and delivery, or the manufacture and delivery, of marketable commodities. They were contracts for artistic skill and labor, and the materials on which they were to be bestowed in the manufacture of articles which were not salable to any one but the defendant when completed because impressed with special features useful only to it. There was nothing in the contracts or their subject-matter indicating any intention of the parties that the stipulations as to time should be deemed of their essence; and the defendant was not justified on account of the slight delay disclosed by the record in refusing to accept the goods, or in repudiating the entire contract. This conclusion disposes of the case, and it is unnecessary to notice other errors assigned.

The judgment below is reversed, and the cause remanded for further proceedings not inconsistent with this opinion.

PEET v. CITY OF EAST GRAND FORKS

Supreme Court of Minnesota, 1907. 101 Minn. 518, 112 N.W. 1003.

BROWN, J. The facts in this case, so far as here material, are as follows: In 1902, one P. H. Thornton entered into a contract with the city of East Grand Forks for grading, macadamizing, and curbing certain of its streets. * * * One Lawson was named as engineer and charged with the general superintendence of the work, and upon his monthly estimates of the work performed the city agreed to pay Thornton. Thornton entered upon the performance of contract No. 3, made extensive excavations, and performed other acts in the execution of the contract, and the engineer issued to him a proper estimate of the amount and value thereof, certifying that \$3,173.13 was due him therefor. This estimate was presented to the city council and by that body approved. No warrant, however, was issued for its payment, by reason of the fact that there was no money in the city treasury available for that purpose. Thornton, not receiving his money

upon the estimate, abandoned the work and never completed it. He assigned and transferred the estimate to plaintiff, who brought this action to recover thereon. The defense interposed was that Thornton, having abandoned his contract and refused to complete the same, was not entitled to recover for the work actually performed. * * *

There is a decided conflict among the authorities in other states upon this question; but the doctrine of the cases cited is in full harmony with the general rule that the unexcused failure of one party to a contract to perform the same in some substantial respect justifies an abandonment thereof by the other, and a recovery by him to the extent the contract had been performed. It is held by some of the courts that the remedy in such cases is an action for damages, and not an abandonment of the contract. The authorities upon both sides of the question will be found in 3 Paige on Contracts, §§ 1489, 1490, and 152 Ill. 59, 38 N.E. 773, 30 L.R.A. 33. That the failure of defendant in this case to make the stipulated payments was a substantial breach of the contract cannot be questioned, and the mere fact that the city had no money in its treasury with which to make the required payments constitutes no valid excuse for its default. The contractor was not bound to proceed with the work in the face of the inability of the city to compensate him as stipulated in the contract, and his abandonment of the work did not forfeit the right to payment for the work actually performed. * * *

(2) *Installment Contracts*

NORRINGTON v. WRIGHT.

Supreme Court of the United States, 1885.
115 U.S. 188, 6 S.Ct. 12, 29 L.Ed. 366.

GRAY, J. * * * In the contracts of merchants time is of the essence. The time of shipment is the usual and convenient means of fixing the probable time of arrival, with a view of providing funds to pay for the goods, or of fulfilling contracts with third persons. A statement descriptive of the subject-matter, or of some material incident, such as the time or place of shipment, is ordinarily to be regarded as a * * * condition precedent,

upon the failure or nonperformance of which the party aggrieved may repudiate the whole contract. * * *

The contract sued on is a single contract for the sale and purchase of 5,000 tons of iron rails, shipped from a European port or ports for Philadelphia. The subsidiary provisions as to shipping in different months, and as to paying for each shipment upon its delivery, do not split up the contract into as many contracts as there shall be shipments or deliveries of so many distinct quantities of iron. * * *

The times of shipment, as designated in the contract, are "at the rate of about 1,000 tons per month, beginning February, 1880, but the whole contract to be shipped before August 1, 1880." These words are not satisfied by shipping one-sixth part of the 5,000 tons, or about 833 tons, in each of the six months which begin with February and end with July. But they require about 1000 tons to be shipped in each of the five months from February to June inclusive, and allow no more than slight and unimportant deficiencies in the shipments during those months to be made up in the month of July. * * * The contract before us comes within the general rule: "When no such independent circumstances are referred to, and the engagement is to furnish goods of a certain quality or character to a certain amount, the quantity specified is material, and governs the contract. The addition of the qualifying words 'about,' 'more or less,' and the like, in such cases, is only for the purpose of providing against accidental variations, arising from slight and unimportant excesses or deficiencies in number, measure, or weight." *Brawley v. United States*, 96 U.S. 168, 171, 172, 24 L.Ed. 622.

The seller is bound to deliver the quantity stipulated, and has no right either to compel the buyer to accept a less quantity, or to require him to select part out of a greater quantity; and when the goods are to be shipped in certain proportions monthly, the seller's failure to ship the required quantity in the first month gives the buyer the same right to rescind the whole contract that he would have had if it had been agreed that all the goods should be delivered at once.

The plaintiff, instead of shipping about 1,000 tons in February and about 1,000 tons in March, as stipulated in the contract, shipped only 400 tons in February, and 885 tons in March. His

failure to fulfill the contract on his part in respect to these first two installments justified the defendants in rescinding the whole contract, provided they distinctly and seasonably asserted the right of rescission.

The defendants, immediately after the arrival of the March shipments, and as soon as they knew that the quantities which had been shipped in February and March were less than the contract called for, clearly and positively asserted the right to rescind, if the law entitled them to do so. Their previous acceptance of the single cargo of 400 tons shipped in February was no waiver of this right, because it took place without notice, or means of knowledge, that the stipulated quantity had not been shipped in February. The price paid by them for that cargo being above the market value, the plaintiff suffered no injury by the omission of the defendants to return the iron; and no reliance was placed on that omission in the correspondence between the parties. * * *

The plaintiff, denying the defendants' right to rescind, and asserting that the contract was still in force, was bound to show such performance on his part as entitled him to demand performance on their part, and, having failed to do so, cannot maintain this action. * * *⁵

(3) *Engineer's Decision as a Condition*

"* * * It is further agreed that in all cases of dispute arising out of this contract regarding the value of extras, the meaning of plans and specifications, allowances of the amount of damages

⁵ Having determined that, due to the nature of the contract, the term as to quantity was material as a clear implication of the intention of the parties, the court in the above case proceeded to a consideration of the materiality of the breach, and, having decided that the failure of performance constituted a material breach, came to the conclusion that its effect was to release the aggrieved party from further duty under the contract.

The presumption, in contracts for the sale of marketable commodities, that the intention of the parties is that the terms as to time, quantity, etc., are material, applies in installment contracts to each installment, and a material breach of such term as to any one shipment will excuse further performance on the part of the aggrieved party.

growing out of violations of any of the provisions of this contract, the decision of the Engineer shall be final and binding on both parties hereto."

KELLY v. PUBLIC SCHOOLS OF CITY OF MUSKEGON.

Supreme Court of Michigan, 1896. 110 Mich. 529, 68 N.W. 282.

Suit by William D. Kelly against the public schools of the city of Muskegon on a contract for the erection of a high school building. From a judgment in favor of defendant, plaintiff brings error. Affirmed.

MOORE, J. The plaintiff is the assignee of Joseph D. Boland, and as such brought suit. Mr. Boland was the contractor for the erection of a high-school building in the city of Muskegon, under a written contract, dated July 6, 1892, which required him to perform all the work and provide all the materials for the erection and completion of the school building; the whole of said work to be performed, and all the materials to be furnished, in conformity with the plans and specifications of the same, as made by Patton & Fisher, of Chicago, Ill., the architects appointed by said party of the second part. The contract provided that, on the fifteenth and last days of each month, payment shall be made on the estimate of the architects, or person appointed by them for that purpose. * * * When the plans and specifications were originally made, they provided for but three chimney stacks that should go through the roof, and two chimney ventilating stacks, running from the basement, and stopping at the third floor. Before the contract was let, the plans and specifications were returned to the architects, with instructions to change them so as to provide for the extension of two ventilating chimney stacks through the roof. The architects undertook to make these changes, and did make them in some of the plans and in some of the specifications, but failed to make detailed changes in all the specifications. These plans and specifications were returned to the board about April 13th, and were consulted by Mr. Boland before he made his bid, which was made May 2, 1892. The contract was let to him May 3d. It was drawn later and signed July 6th.

When Mr. Boland, in his work of erecting the building, reached the third or assembly floor, he stopped work on the two chimney

ventilating stacks, which he had erected from the basement to that place, because, as he read his contract, it did not call for the erecting of those stacks higher than that point. When the superintendent ascertained that Mr. Boland was not intending to erect the stacks higher than the third floor, he called the attention of the chairman of the building committee to it, and explained to him what Mr. Boland claimed with reference to the stacks. The chairman then examined the specifications and plans with the superintendent, and his attention was particularly called by the superintendent to the specifications, which called only for three chimneys to go above the roof, the other two to stop at the floor of the assembly room. The chairman said to the superintendent that these two chimneys must be built up, and, if there was any question as to the responsibility of the school board in the matter, he would report it at the next meeting of the board. The superintendent insisted that the chairman should go to the building and examine into the matter himself. He did so, and decided that it would not be practicable, with the experience they had had, to leave the flues in that shape. A school building in the city had formerly burned from that cause, and he insisted that such a thing should not happen again, and decided to carry the flues to the roof, and stated to Mr. Boland and the superintendent that the matter in controversy must be settled by the full board. The chairman testified that at that conversation at the high school building, just referred to, he stated and understood that the intention of the plans and specifications was to stop these stacks at the third floor, but that he protested against it, and would not have it that way, and ordered them built up.

Accordingly, Mr. Boland went on with the work, and, in due course of time, finished the building and topped out these two chimney stacks. The matter was submitted to the architects whether he should receive extra compensation for that work, and they decided that he should not. The defendant corporation declined to pay for the labor and materials expended in the topping out of these two stacks; claiming that the contract made the architects the arbiters in the matter, and their decision protected the defendant. Mr. Boland assigned his claim to the plaintiff, who, after the building was completed and accepted, brought suit; and on the trial of the case, before a jury, the circuit judge directed a verdict for the defendant, on the ground that the deci-

sion of the architects was binding upon both parties and final.

* * *

The plans and specifications were accessible to, and examined by, Mr. Boland, before he made his contract. An examination of them would show there were apparent discrepancies in them. With that condition of things existing, Mr. Boland signed a contract containing the following provision: "That if any apparent discrepancy shall be found to exist between the plans, working drawings, and specifications, the decision as to the fair construction, and of the true intent and meaning, of the plans, working drawings, and specifications, shall be made by the said architects, whose decision shall be binding, in that regard, upon the parties hereto." This seems like a reasonable provision, and we think both parties are bound by it. The circuit judge was requested to charge the jury, in effect, that, if the architects were guilty of fraud in making their decision, it would not be binding upon Mr. Boland or his assignee. The circuit judge refused to give this charge, and counsel for plaintiff make a learned and exhaustive brief upon the error they have assigned to the refusal of the court to charge as requested, calling our attention to many decisions. The trouble with their argument is, there is no testimony to base it upon. Unless the fact that the architects who drew the plans and specifications were to receive as their compensation 5 per cent. of the total cost of the building, will warrant an inference of fraud in their decision, there is nothing in the record to indicate but what their decision was made in the utmost good faith. We are not prepared to draw any such conclusion.

Judgment is affirmed. The other justices concurred.

(4) *Satisfaction as a Condition*

BROWN v. FOSTER.

Supreme Judicial Court of Massachusetts, 1873. 113 Mass. 136, 18 Am. Rep. 463.

[Action on a contract to recover the price of a suit of clothes. By the agreed state of facts it appeared that by the contract the plaintiff was to make a suit of clothes for the defendant on or before a specified day; that the suit was to be made to the satis-

faction of the defendant; that the suit was delivered at the time specified, and defendant refused to accept it, stating that he was not satisfied.]

The defendant offered evidence that the clothes did not fit him, and that they were not made in the manner and form agreed upon. While the defendant was testifying, the plaintiff produced the clothes in court, and requested the defendant to try them on in the presence of the jury. The defendant assented, and, having put them on, wore them in the presence of the court and jury. The plaintiff then called several tailors as experts, who testified that the clothes needed some alterations before they could be called a good fit, but that such alterations could be easily made without injury to them. He also offered evidence that he wrote a letter to the defendant the same day the clothes were returned, in which the following language was used: "Can't you come and let us see what the trouble with the fit of your clothes is? From what you say about the coat we think we could remedy that, and we could make another vest if necessary, and coat, too." To this letter the defendant replied that the clothes were unsatisfactory to him as they were, and that he would not accept them after they had been worked over and botched up, and refused to allow the plaintiff to make a new suit, or to accept any alterations to the suit already made. * * *

The jury returned a verdict for the plaintiff, and the defendant excepted.

DEVENS, J. There was evidence at the trial to show that the contract between the parties was an express contract, and by the terms of it the plaintiff agreed to make and deliver to the defendant upon a day certain a suit of clothes, which were to be made to the satisfaction of the defendant. The clothes were made and delivered upon the day specified, but were not to the satisfaction of the defendant, who declined to accept and promptly returned the same. If the plaintiff saw fit to do work upon articles for the defendant and to furnish materials therefor, contracting that the articles when manufactured should be satisfactory to the defendant, he can recover only upon the contract as it was made; and even if the articles furnished by him were such that the other party ought to have been satisfied with them, it was yet in the power of the other to reject them as unsatisfactory. It is not for any one else to decide whether a refusal to accept is or is not

reasonable, when the contract permits the defendant to decide himself whether the articles furnished are to his satisfaction. Although the compensation of the plaintiff for valuable service and materials may thus be dependent upon the caprice of another who unreasonably refuses to accept the articles manufactured, yet he cannot be relieved from the contract into which he has voluntarily entered. * * *

Exceptions sustained.

MIDGLEY et al. v. CAMPBELL BLDG. CO.

Supreme Court of Utah, 1911. 38 Utah 293, 112 P. 820.

Action by E. A. Midgley and another against the Campbell Building Company. From a judgment for plaintiff, defendant appeals.

STRAUP, J. In May, 1902, the government of the United States entered into a written contract with the appellant, the Campbell Building Company, to construct a government building at Salt Lake City, in accordance with plans and specifications prepared by the supervising architect. * * *

Neither in the contract between the government and the Campbell Building Company, nor in the plans and specifications, was it stipulated or provided that the material or fixtures to be furnished and used should be made by any particular manufacturer. It, however, was made to appear by the evidence that on the 6th of March, 1903, nearly one year after the making of the contract between the government and the Campbell Building Company, and about one year before the Campbell Building Company entered into the contract with the Midgley Bros., the Campbell Building Company, by letter submitted to the supervising architect a list and catalogue number of the articles referred to, and gave Clow & Sons as the name of the manufacturer, which were then approved by the supervising architect. On the 9th of March, 1904, after receiving and accepting one of several different bids submitted by Midgley Bros., the Campbell Building Company entered into a contract with them to furnish the material for, and to do the plumbing work of, the building, by the terms of which Midgley Bros. agreed "to furnish all and singular the materials

and labor necessary to complete the plumbing, gas fitting, sewerage, etc., under the specification headings from page 33½ to 45, inclusive," relating to the plumbing, "all to be in strict and full accordance with the plans, details and specifications prepared by" the supervising architect. It was further stipulated in their contract that the "second party (Campbell Building Company) for and in consideration of the first parties (Midgley Bros.) completing and faithfully executing the aforesaid contract and by and at the time mentioned and to the full and complete satisfaction of the supervising architect and the superintendent of construction, does hereby agree to pay" Midgley Bros. the sum of \$9,500 at the times and in the manner specified in the contract. There is nothing contained in the contract between the Campbell Building Company and Midgley Bros. requiring the latter to furnish or use fixtures or material manufactured by Clow & Sons, or by any particular manufacturer.

[In their subsequent performance under this contract Midgley Bros. used the identical plumbing fixtures called for by the plans and specifications, except that they were purchased from Crane & Co. rather than from Clow & Sons. It appears from the evidence that neither Crane & Co. nor Clow & Sons were the manufacturers of these fixtures, but that they were made by some other firm and that the above mentioned firms were merely jobbers. The fixtures furnished by Midgley Bros. and bought from Crane & Co. were the same fixtures shown in Clow's catalogue of 1902 and approved by the supervising architect.

[Because these fixtures were purchased from Crane & Co. and not from Clow & Sons, the supervising architect condemned and rejected them. In this suit on the contract, the defendant, Campbell Building Company, claims to have been released from the contract by reason of the breach by the Midgleys of the condition precedent of furnishing and installing the materials to the approval and satisfaction of the supervising architect.

[It is urged by the defendant that because the contract expressly conditioned their duty to pay upon "the faithful execution of the work to the full and complete satisfaction of the supervising architect," the supervising architect could properly reject the fixtures offered to be installed by the Midgleys, regardless of whether his doing so was wise or unwise, reasonable or unreason-

able, capricious or otherwise. Such is not our understanding of the law applicable to cases of this nature.]

The [defendant] has referred us to numerous cases to the effect, and with which holdings we concur, that where a promisor agrees to pay for work or goods provided he is satisfied with them he cannot, if he is not satisfied, be made to accept and pay for them, or be compelled to pay for them if he rejects them; and that the right, except for fraud or bad faith, to inquire into the ground for his action, is ordinarily excluded. In such case, when he has not accepted the goods or the benefit of the work, it generally is sufficient that he said he was "not satisfied." This principle, however, is more generally applied to cases involving taste, fancy, sensibility, or judgment of the promisor. That is, if the subject-matter of the contract is a coat or a painting, for which the promisor agrees to pay, if the coat or the painting is to his satisfaction, he is not obligated to accept or pay for it, if he is not satisfied, though the coat may be of the best material and workmanship and style, or the painting executed in the most artistic and skillful manner and an exact likeness of the original. But this does not give the promisor a cause of action against the tailor or painter for damages for breach of contract because the coat or painting did not satisfy the fanciful taste or capricious mental state of the promisor. It is quite enough that he in such case is not required to accept and pay for the coat or the painting, if he is not satisfied, without assigning any reason therefor, except that he is not satisfied. He may not, however, also insist that the tailor keep on making coats for him, or the painter painting pictures, until the indefinable and fanciful taste of his mind is satisfied, and upon his refusal so to do subject him to a claim for damages for breach of contract. The principle has also been applied by some of the courts to questions involving not only fancy, taste, etc., but also to what is termed by them operative fitness or mechanical utility. References to the cases may be found in 9 Cyc. 617-624.

[This principle is not, however, applicable to the class of cases to which that now under consideration belongs. It does not appear to us that there is anything particularly sentimental or fanciful, or tasteful, about water-closets, slop sinks, or basin faucets, especially in a public building. It is chiefly requisite that they be sanitary, useful, suitable, and neat. The controlling factor in]

the contract is not that the goods should satisfy the fancy, taste, or aesthetic sense of the supervising architect. The important thing is that they be "in strict accordance with the plans and specifications, and of the best quality found in the market." In contracts not involving personal taste the condition precedent of satisfaction contains the implied term of reasonableness.

[The instruction to the jury in the present case that "satisfactory" means "reasonably satisfactory" was not erroneous as applied to the subject matter of this contract. The verdict of the jury was amply sustained by the evidence, and the judgment for the plaintiff ought to be affirmed with costs to the respondent. It is so ordered.]

(C) THE DOCTRINE OF SUBSTANTIAL PERFORMANCE

In building contracts and other contracts involving many details, if the contractor performs almost completely, committing a breach that is so slight as to be less than breach of a condition precedent, provided it be not intentional or willful, the contractor may be allowed to recover the agreed consideration minus damages for the amount of loss caused the other party by the slight breach. This is known as the rule of substantial performance. If the breach be entirely immaterial, causing no damage whatever, as in the instance of necessary substitution of material of absolutely the same kind and grade but of different make from the make specified, of course no deduction could justly be made, and the contractor could recover the full consideration named in the contract.

But the doctrine of substantial performance will not be applied in favor of a contractor if his breach be willful. He must fully perform, or he may not recover on the contract.

The rule applying to contracts generally, requiring strict performance in order to permit recovery, when applied to a builder becomes most inequitable, in that it gives to the owner the advantage of retention of the builder's labor and materials and at the same time relieves him from paying the contract price therefor. Thus the rule has been qualified by the introduction of the doctrine of substantial performance. Under this doctrine, the builder may recover on the contract without a literal and strict performance (the owner being compensated for the breach in damages to be deducted from the contract price), but with these

provisos to the application of the doctrine: First, the builder's breach must not be willful; and, second, the breach must not be so serious as to amount to the breach of a condition precedent.

We have already examined the effect of breach of a term expressly made a condition precedent, and we have also seen that a material breach of a material term of a contract will amount to the breach of an implied condition precedent. Any breach less than these will leave a substantial performance, at least where the breach is not willful. Thus, (1) an immaterial breach of a material term, (2) a material breach of an immaterial term, or (3) an immaterial breach of an immaterial term, will in each case leave a substantial performance for which there may be recovery of the contract price less the damages created by the breach.

The doctrine of substantial performance does not protect the willful contract breaker or the contractor who has, under any conditions, deviated widely from performing the conditions named in the contract.

JACOB & YOUNGS, Inc., v. KENT.

Court of Appeals of New York, 1921.
230 N.Y. 239, 129 N.E. 889, 23 A.L.R. 1429.

CARDOZO, J. The plaintiff built a country residence for the defendant at a cost of upwards of \$77,000, and now sues to recover a balance of \$3,483.46, remaining unpaid. The work of construction ceased in June, 1914, and the defendant then began to occupy the dwelling. There was no complaint of defective performance until March, 1915. One of the specifications for the plumbing work provides that "all wrought iron pipe must be well galvanized, lapwelded pipe of the grade known as 'standard pipe' of Reading manufacture." The defendant learned in March, 1915, that some of the pipe, instead of being made in Reading, was the product of other factories. The plaintiff was accordingly directed by the architect to do the work anew. The plumbing was then encased within the walls except in a few places where it had to be exposed. Obedience to the order meant more than the substitution of other pipe. It meant the demolition at great expense of substantial parts of the completed structure. The plaintiff left the work un-

touched, and asked for a certificate that the final payment was due. Refusal of the certificate was followed by this suit.

The evidence sustains a finding that the omission of the prescribed brand of pipe was neither fraudulent nor willful. It was the result of the oversight and inattention of the plaintiff's subcontractor. Reading pipe is distinguished from Cohoes pipe and other brands only by the name of the manufacturer stamped upon it at intervals of between six and seven feet. Even the defendant's architect, though he inspected the pipe upon arrival, failed to notice the discrepancy. The plaintiff tried to show that the brands installed, though made by other manufacturers, were the same in quality, in appearance, in market value, and in cost as the brand stated in the contract—that they were indeed, the same thing, though manufactured in another place. The evidence was excluded, and a verdict directed for the defendant. The Appellate Division reversed, and granted a new trial.

We think the evidence, if admitted, would have supplied some basis for the inference that the defect was insignificant in its relation to the project. The courts never say that one who makes a contract fills the measure of his duty by less than full performance. They do say, however, that an omission, both trivial and innocent, will sometimes be atoned for by allowance of the resulting damage, and will not always be the breach of a condition to be followed by a forfeiture. *Spence v. Ham*, 163 N.Y. 220, 57 N.E. 412, 51 L.R.A. 238. * * *

Those who think more of symmetry and logic in the development of legal rules than of practical adaptation to the attainment of a just result will be troubled by a classification where the lines of division are so wavering and blurred. Something, doubtless, may be said on the score of consistency and certainty in favor of a stricter standard. The courts have balanced such considerations against those of equity and fairness, and found the latter to be the weightier. The decisions in this state commit us to the liberal view, which is making its way, nowadays, in jurisdictions slow to welcome it. * * * We must weigh the purpose to be served, the desire to be gratified, the excuse for deviation from the letter, the cruelty of enforced adherence. Then only can we tell whether literal fulfillment is to be implied by law as a condition. This is not to say that the parties are not free by apt and certain words

to effectuate a purpose that performance of every term shall be a condition of recovery. That question is not here. This is merely to say that the law will be slow to impute the purpose, in the silence of the parties, where the significance of the default is grievously out of proportion to the oppression of the forfeiture. The willful transgressor must accept the penalty of his transgression. *Schultze v. Goodstein*, 180 N.Y. 248, 251, 73 N.E. 21; *Desmond-Dunne Co. v. Friedman-Doscher Co.*, 162 N.Y. 486, 490, 56 N.E. 995. For him there is no occasion to mitigate the rigor of implied conditions. The transgressor whose default is unintentional and trivial may hope for mercy if he will offer atonement for his wrong. *Spence v. Ham*, *supra*.

In the circumstances of this case, we think the measure of the allowance is not the cost of replacement, which would be great, but the difference in value, which would be either nominal or nothing. Some of the exposed sections might perhaps have been replaced at moderate expense. The defendant did not limit his demand to them, but treated the plumbing as a unit to be corrected from cellar to roof. In point of fact, the plaintiff never reached the stage at which evidence of the extent of the allowance became necessary. The trial court had excluded evidence that the defect was unsubstantial, and in view of that ruling there was no occasion for the plaintiff to go farther with an offer of proof. We think, however, that the offer, if it had been made, would not of necessity have been defective because directed to difference in value. It is true that in most cases the cost of replacement is the measure. *Spence v. Ham*, *supra*. The owner is entitled to the money which will permit him to complete, unless the cost of completion is grossly and unfairly out of proportion to the good to be attained. When that is true, the measure is the difference in value. Specifications call, let us say, for a foundation built of granite quarried in Vermont. On the completion of the building, the owner learns that through the blunder of a subcontractor part of the foundation has been built of granite of the same quality quarried in New Hampshire. The measure of allowance is not the cost of reconstruction. "There may be omissions of that which could not afterwards be supplied exactly as called for by the contract without taking down the building to its foundations, and at the same time the omission may not affect the value of the building for use or otherwise, except so slightly as to

be hardly appreciable." *Handy v. Bliss*, 204 Mass. 513, 519, 90 N.E. 864, 134 Am.St.Rep. 673. Cf. *Foeller v. Heintz*, 137 Wis. 169, 178, 118 N.W. 543, 24 L.R.A., N.S., 327; *Oberlies v. Bullinger*, 132 N.Y. 598, 601, 30 N.E. 999; 2 Williston on Contracts, § 805, p, 1541. The rule that gives a remedy in cases of substantial performance with compensation for defects of trivial or inappreciable importance has been developed by the courts as an instrument of justice. The measure of the allowance must be shaped to the same end.

The order should be affirmed, and judgment absolute directed in favor of the plaintiff upon the stipulation, with costs in all courts.⁶

NORTH AMERICAN WALL PAPER CO. v. JACKSON
CONSTRUCTION CO. et al.

Supreme Court of New York, Appellate Division, First Department, 1915.
167 App.Div. 779, 153 N.Y.S. 204.

LAUGHLIN, J. This is an action to foreclose a mechanic's lien. The plaintiff sues in the right of the copartnership firm of Glick & Eckstein, who had a contract with the appellant for varnishing, painting, papering, and decorating three five-story apartment buildings, containing 93 apartments. The contract provided that the plaintiff's assignors should do all the work for the gross sum of \$3,200. They were paid \$2,150 on account, and the plaintiff by this action sought to foreclose the lien for the balance. It alleged complete performance by its assignors, excepting in so far as performance was waived. The principal questions litigated on the trial were concerning performance by the plaintiff's assignors with respect to varnishing the floors, enameling the dadoes and tubs in the bathrooms, and painting the bathrooms, kitchens, and bedrooms. With respect to these matters, the plaintiff claimed full performance, and failed to give any evidence tending to show a waiver of complete performance. Testimony of a general nature was offered, in behalf of the plaintiff, tending to sustain its contention that the contract was fully performed in these respects; but more definite testimony was offered in

⁶ The dissenting opinion of McLaughlin, J., is omitted.

behalf of appellant to the contrary, and the learned trial court found, and we agree with his determination, that it outweighs the evidence offered in behalf of the plaintiff. The court did not find, and on the evidence could not have found, that there was any waiver of performance with respect to this part of the work. The court did, however, find that the plaintiff's assignors performed their contract with the exception that they "did not complete the bathrooms and a number of the floors as required in and by the terms of the said agreement," and that by reason of their failure "to so complete said contract, the defendant Jackson Construction Company is entitled to a credit therefor of the sum of \$450." Without any finding of good faith on the part of plaintiff's assignors, or that the work omitted was omitted through oversight or excusable neglect, the court sustained the lien for the balance of the amount unpaid, to wit, \$600, and decreed a foreclosure.

The principal question presented by the appeal is whether, in view of the pleadings and of this finding with respect to the value of the work omitted by the plaintiff's assignors, from which plaintiff has not appealed, the judgment can be sustained. The omission aggregated about 14 per cent. of the entire contract price of the work. If the evidence showed, or tended to show, that the plaintiff was entitled to recover on the theory of substantial performance, we could, if the ends of justice required it, find substantial performance or grant a new trial. An examination of the evidence, however, convinces us that the plaintiff would not be entitled to recover even on the theory of substantial performance.

The courts have been quite liberal in these suits in equity to sustain a cause of action in favor of one who has attempted in good faith to perform his contract, but has, through oversight, misunderstanding, or any excusable neglect, failed to completely perform in certain respects deemed unsubstantial, for which the owner may be adequately indemnified by an allowance and deduction from the contract price for the work, and in such case, on an allegation of full performance, permit a recovery on the theory of substantial performance, where the contractor shows the cost of performing the omitted work. *Woodward v. Fuller*, 80 N.Y. 312; *Spence v. Ham*, 163 N.Y. 220, 57 N.E. 412, 51 L.R.A. 238. * * *

But there is a limit to the application of this rule, and a party who knowingly and willfully fails to perform his contract in any respect, or omits to perform a substantial part of it, cannot be permitted, under the guise of this rule, to recover for the value of the work done; and the trend of the more recent decisions is to hold the percentage of omitted work may, in and of itself, be sufficient to show that there has not been a substantial performance. * * * It fairly appears by the evidence that after the plaintiff's assignors varnished some of the floors, the plaster fell from the ceilings without any fault on their part, and that the fall of the plaster and the work incident to removing it and to replastering and repairing the plaster injured the varnish. That, of course, would be no bar to a recovery; but by the terms of the contract the plaintiff's assignors guaranteed that the varnish would not "scratch or turn under water," and the uncontested evidence shows that they purchased and used an inferior brand of varnish, which would not hold firm when wet, although the same manufacturer made a higher priced varnish which would withstand water. The evidence shows that the varnish was unsuitable for this work, that it softened when wet and dried up and became loose and could be swept into piles. * * * There is, however, ample evidence to sustain a finding that there was a failure to do the enameling required, and since performance of that work was not waived, it cannot be said that it was not a substantial part of the work, or that its performance was omitted through an oversight, as to which there is no evidence.

We accept, therefore, the finding of the trial court to the effect that there was a failure to perform work of the value of \$450 with respect to the floors and bathrooms, and on that finding, in view of the evidence to which we have alluded, we think the plaintiff was not entitled to recover, for it constituted a substantial part of the contract work. There is evidence tending to show that the plaintiff's assignors did not perform in other respects, which would have justified a finding to that effect. The evidence fairly shows a disregard on the part of the plaintiff's assignors of their contract obligations and a deliberate attempt on their part to use material different from that required by the contract. It is claimed that there is evidence in the case tending to show that plaintiff's assignors did over certain work injured through no fault of theirs, but that was not satisfactorily shown; and,

as no claim for extra work was asserted, we cannot attempt to even up the equities by making an allowance on account of such extra work.

It follows that the findings of fact and conclusions of law and judgment should be modified in accordance with these views, so that it will appear thereby that the plaintiff's assignors did not, in good faith, endeavor to complete performance of their contract, and did not substantially perform, and failed to perform, substantial and material work of the reasonable value of \$450, and directing the dismissal of the complaint, with costs, but in all other respects allowing the judgment to stand in favor of the defendant Sinnott.

Settle order on notice. All concur.

MANITOWOC STEAM BOILER WORKS v. MANITOWOC
GLUE CO.

Supreme Court of Wisconsin, 1903. 120 Wis. 1, 97 N.W. 515.

Action to recover the contract price and enforce a lien for supplying a steam boiler to the defendant. The evidence disclosed that the defendant operated a glue factory, requiring a large amount of steam, not only for power, but also for heating and drying; that it had an old tubular boiler, which had been manufactured by the plaintiff, and with which and its use the plaintiff was entirely familiar; that in such situation the parties negotiated for a new boiler, the defendant stating to the plaintiff that the old boiler was inadequate—that it had a commercial rating of about 80 horse power, and that one was needed of about 100 horse power. The plaintiff's manager counseled one still larger, namely, to rate about 125 horse power, as compared with the old one, 80 horse power. The agreement finally reached was that the new one should be substantially of 50 per cent. more capacity than the old, but was to be of the Scotch type, instead of the tubular type. Plaintiff constructed a boiler of the Scotch type, put it in place in a building and upon brick foundation constructed by the defendant for that purpose. After it was connected up, it was found disappointing in capacity, and not up to the old boiler, but was used, in connection with the

old one, to furnish the steam necessary for the factory, while efforts were made both by plaintiff and defendant to make it work more efficiently. These efforts being still unsatisfactory, the defendant complained of the boiler as not satisfying the contract, and, as the defendant's manager testifies, desired to have to have it taken away. [A little later, this suit was brought for the contract price of the new boiler.] At the close of the evidence the court made findings to the effect that the contract was as above stated, and that the boiler put in, instead of being 50 per cent. greater capacity than the old one, was about 20 per cent. less capacity, and announced that upon the then state of the pleadings the defendant would be entitled to a judgment dismissing the complaint, but, on the theory that the defendant had offered some evidence of the reasonable value of the boiler and had accepted the same, the court entered an order that the plaintiff might amend his complaint by adding a count in quantum meruit. [This was done, and at the ensuing trial defendant offered expert testimony that the boiler supplied would be worth approximately \$1,800 less than a boiler of the capacity contracted for. Thereupon the court made findings that the plaintiff had substantially performed its contract, except that, instead of a boiler 50 per cent. greater than the old one, it had supplied one of about 20 per cent. less capacity, that defendant had accepted the boiler, and that the reasonable value thereof was original contract price, for which judgment was rendered. Defendant prosecuted this appeal.]

DODGE, J. The result of this action, whereby the defendant is required to pay the full contract price for a boiler of only about one-half the capacity or value of that for which it agreed to pay, is somewhat startling, especially in view of the consideration, understood by both parties, that its only reason for buying a new boiler at all was that the operation of the factory required more steam than the old one could supply. Before reaching such a result, a court should pause to re-examine the rules of law or processes of reasoning upon which it is based. If the law warrants it, the force or value of a contract seems to have vanished. The contractor receives the same compensation for non-performance as for performance. The general rule of law is firmly established that he who makes an entire contract can recover no pay unless he performs it entirely and according to its

terms. * * * This general rule has, with considerable hesitation, been relaxed for equitable considerations in certain exceptional situations where it is believed to work hardship:

First, in favor of laborers who contract to perform personal services, and without fault of either party fail of complete performance; * * * secondly, in building contracts, where the contractor constructs something on the land of another which by oversight, but in good-faith effort to perform fails to entirely satisfy the contract, but is so substantially in compliance therewith that the structure fully accomplishes the purpose of that contracted for, and the other party voluntarily accepts the benefit thereof, or where the failure is mere inconsiderable incompleteness, and the expense of completion is easy of ascertainment; * * * and, thirdly, where the contractor supplies an article different from or inferior to that promised, and the recipient, having full opportunity to reject without loss or injury, decides to accept and retain the thing furnished. This third phase is hardly an exception, for such voluntary acceptance may well be deemed the making of a new contract to take and pay reasonably for the article which does not satisfy the original contract. * * *

Proceeding to ascertain how far these principles are applicable to the situation at bar, we are confronted by the fact that substantial performance of the express contract is wholly wanting. The finding is that the boiler furnished was about 82 per cent. of the capacity of the old one, instead of 150 per cent., and that the increase of capacity was the vital and essential part of the contract. This is in no sense substantial performance. The boiler does not serve at all the purpose which the larger one would have served, and for which it was purchased. Defendant can obtain that for which it contracted, and for which it agreed to pay \$2,035, and which is necessary to the purpose which induced the contract, in only one of two ways: either it can remove this boiler from its premises at large expense, if plaintiff does not remove it, and purchase and put in place another of the required size; or it can retain it, and put in another of substantially equal capacity as auxiliary to it, and at a cost equal to or greater than the original contract price, and probably necessitating reconstruction of his boiler house. One in such predicament cannot be said to have received in substance

that for which he contracted. *Malbon v. Birney*, *supra* [11 Wis. 107]; *Fuller, etc., Co. v. Shurts*, *supra* [95 Wis. 606, 70 N.W. 683]. Neither do we discover either finding or proof that defendant had accepted the boiler, had decided to keep it, and use it so far as it will go toward supplying the needed steam.

True, the trial court argues that it would be inequitable to allow defendant to keep the boiler and pay nothing for it, but does not find that it has elected to do so. * * * Doubtless the fact, unexplained, that defendant made use of the boiler, which had been built into its boiler house and connected with the steam pipes in its factory, is an evidentiary circumstance having some tendency to show acceptance, but such conduct is by no means conclusive when a party cannot forego use of the appliance without at the same time giving up the use of his own premises. Thus one whose land has been plowed by another cannot be said to accept that plowing as a service merely because he sows seed and raises a crop on the land. *Smith v. Brady*, 17 N.Y. 188, 72 Am.Dec. 442. Nor because a city runs sewerage through filter beds at its sewer outlet does it necessarily accept them. *Madison v. Amer. San. Eng. Co.*, 118 Wis. 480, 95 N.W. 1097. Nor because the owner lives in his house, and uses the defective furnace therein, does he necessarily accept the latter. *Williams v. Thrall*, *supra* [101 Wis. 337, 76 N.W. 599]; *Fuller, etc., Co. v. Shurts*, *supra*. Nor because one takes his own logs does he accept the cutting and driving done upon them by another. *McDonald v. Bryant*, 73 Wis. 20, 26, 40 N.W. 665. * * *

The result is that at the close of the trial there was no evidence to support a recovery on the contract, and the court should have rendered judgment dismissing the complaint. Neither was there evidence to support a cause of action quantum meruit. * * *

Judgment reversed, and cause remanded, with directions to enter judgment dismissing the complaint.

GILLESPIE TOOL CO. v. WILSON et al.

Supreme Court of Pennsylvania, 1888. 123 Pa. 19, 16 A. 36.

[Action by the Gillespie Tool Company against R. J. Wilson & Tener, to recover for boring a gas well. The contract of the plaintiff company was to put down and case a gas well for the defendants, 2,000 feet deep, to be 8 inches in diameter for 400 feet, to shut off fresh water, and below that, to the bottom, to be $5\frac{5}{8}$ inches in diameter. If salt water was found below 400 feet, the $5\frac{5}{8}$ -inch casing to be drawn, and the hole reamed out to 8 inches in diameter, to shut off salt water, then $5\frac{5}{8}$ -inch hole to the bottom. The well was put down the 2,000 feet, but the diameter was not as specified in the contract. It was an 8-inch hole to the depth of 940, to 1,820 a $5\frac{5}{8}$ -inch hole; and from that to the bottom a $4\frac{1}{4}$ -inch hole. At the depth of 1,729 feet, a salt rock was struck, nearly 100 feet in thickness. To shut off this salt water and finish the well $5\frac{5}{8}$ inches in diameter, the casing from 940 to 1,820 feet would have to be drawn, and the hole reamed out to 8 inches in diameter. Instead of doing that, the plaintiff inserted casing inside the $5\frac{5}{8}$ -inch casing, and this shut off the salt water, but in consequence thereof could make the well below only $4\frac{1}{2}$ inches in diameter. The court below dismissed the suit on the ground that plaintiff had not made out a substantial performance of the contract.]

STERRETT, J. Plaintiff company neither proved nor offered to prove such facts as would have warranted the jury in finding substantial performance of the contract embodied in the written propositions submitted to and accepted by the defendants. In several particulars the work contracted for was not done according to the plain terms of the contract. Nearly one-half of the well was not reamed out, as required, to an 8-inch diameter, so as to admit $5\frac{5}{8}$ -inch casing in the clear. About 180 feet of the lower section of the well, also, was bored 4 or $4\frac{1}{4}$ inches, instead of $5\frac{5}{8}$ inches in diameter. In neither of these particulars, nor in any other respect, was there any serious difficulty in the way of completing the work in strict accordance with the terms of the agreement. To have done so would have involved nothing more than additional time and increased expense. The fact was patent, as well as proved by undisputed

evidence, that a $4\frac{1}{4}$ -inch well would not discharge as much gas as one $5\frac{5}{8}$ inches in diameter. It is no answer to say that, for the purpose of testing the territory, a $4\frac{1}{4}$ -inch well was as good as a $5\frac{5}{8}$ -inch well; nor that reaming out the well to the width and depth required by the contract would have subjected defendants to additional expense without any corresponding benefit. That was their own affair. They contracted for the boring of a well of specified depth, dimensions, etc., and they had a right to insist on at least a substantial performance of the contract according to its terms. That was not done, and the court was clearly right in refusing to submit the case to the jury on evidence that would not have warranted them in finding substantial performance of the contract.

The equitable doctrine of substantial performance is intended for the protection and relief of those who have faithfully and honestly endeavored to perform their contract in all material and substantial particulars, so that their right to compensation may not be forfeited by reason or mere technical, inadvertent, or unimportant omissions or defects. It is incumbent on him who invokes its protection to present a case in which there has been no willful omission or departure from the terms of his contract. If he fails to do so, the question of substantial performance should not be submitted to the jury. * * *

Judgment affirmed.

SECTION 2.—PREVENTION AS EXCUSE FOR NON-PERFORMANCE

Where one party to a contract prevents the other from performing, such other party may treat the contract as broken, cease his own performance, and sue at once for the profit he would have made had the contract been completed.

The theory upon which the courts treat the contract as broken is that duties of performance are always impliedly conditioned upon noninterference, and that it is this implied term of the contract which has been broken.

Where one party to a contract is prevented by the other from performing, he may either (1) refuse further performance, treating the contract as at an end, and sue for damages for the breach or in quantum meruit for his part performance; or (2) he may elect to proceed with the contract and use the prevention as an excuse for all delay occasioned thereby. "A party who engages to do work has a right to proceed free from any let or hindrance of the other party, and if such other party interferes, hinders, and prevents the doing of the work to such an extent as to render its performance difficult and largely diminish the profits, the first may treat the contract as broken, and is not bound to proceed. It may stop and sue for the damages which it has sustained by reason of the nonperformance which the other has caused."⁷

UNITED STATES v. UNITED ENGINEERING & CONTRACTING CO.

Supreme Court of the United States, 1914.
234 U.S. 236, 34 S.Ct. 843, 58 L.Ed. 1294.

[Appeal from the Court of Claims to review a judgment against the United States in a suit upon a contract for public work. Affirmed.]

Mr. Justice DAY delivered the opinion of the court.

Suit was brought in the court of claims by the United Engineering & Contracting Company to recover of the United States upon a contract, dated the 15th of September, 1900, for the construction within seven calendar months, from the date of the contract, namely, by April 15, 1901, of a pumping plant for Dry Dock No. 3 at the New York Navy Yard, the work to be done in accordance with certain plans and specifications annexed to and forming a part of the contract. The claimant recovered a judgment (47 Ct.Cl. 489), and the United States brings this appeal.

The principal question in the case involves the correctness of that part of the judgment of the court of claims which permitted

⁷ Anvil Mining Co. v. Humble, 153 U.S. 540, 14 S.Ct. 876, 38 L.Ed. 814 (1894).

the claimant to recover \$6,000, which the government had deducted as liquidated damages for 240 days' delay in the completion of the work, at the rate of \$25 per day. To understand this question the terms of the contract and certain facts found by the court of claims, upon which the case is to be considered here, must be had in view.

[The claimant commenced the construction of the work in accordance with the contract, and after a portion thereof had been done, the plans and specifications furnished by the government were found defective. The government then made changes in the work to be done and at times caused entire cessation of the work. Three supplemental agreements were made, not containing any provision for liquidated damages. Further delay was caused by the government's use of the docks for docking vessels.] The work was completed and accepted finally by the government on April 5, 1905.

Notwithstanding the delays of the government, the court of claims found that the claimant, with reasonable diligence, could have completed the plant for tests during the period by about September 21, 1903, and found that if it was chargeable for the delay according to the liquidated damage clause of paragraph 12 of the specifications of \$25 per day, the deduction would be \$750 less than the government had deducted. But it found that, if the claimant was only liable for actual damages, and it did so determine, since there was no evidence as to such damages, the claimant was entitled to recover the entire amount deducted.

* * *

[The sole question for determination here is whether, when the work was delayed solely because of the government's fault beyond the time fixed for completion, the claimant can be charged the \$25 per day for each day of delay according to the liquidated damage clause of the contract, or whether this breach of the time term of the contract has been excused by the prevention.] We think the better rule is that when the contractor has agreed to do a piece of work within a given time, and the parties have stipulated a fixed sum as liquidated damages, not wholly disproportionate to the loss for each day's delay, in order to enforce such payment the other party must not prevent the performance of the contract within the stipulated time, and that where such is the case, and thereafter the work is completed, though delayed by the

fault of the contractor, the rule of the original contract cannot be insisted upon, and liquidated damages measured thereby are waived. Under the original and first supplemental agreements, the claimant knew definitely that he was required to complete the work by a fixed date. Presumably the claimant had made its arrangements for completion within the time named. Certainly the other contracting party ought not to be permitted to insist upon liquidated damages when it is responsible for the failure to complete by the stipulated date, to do this would permit it to recover damages for delay caused by its own conduct. * * *

[Judgment affirmed.]

Written Notice as a Condition to Showing Prevention

UNITED STATES v. CUNNINGHAM.

United States Court of Appeals for the District of Columbia, 1941.
75 App.D.C. 95, 125 F.2d 28.

Action by John K. Cunningham, receiver of the W. C. Briddell Company, against the United States of America under the Tucker Act, Judicial Code § 24(20), 28 U.S.C.A. § 41(20), to recover damages allegedly caused by the failure of the United States to supply on time preliminary information called for under a construction contract and to recover the amount deducted from the contract price by the United States for liquidated damages. From a judgment for plaintiff, defendant appeals.

GRONER, C. J. On January 30, 1932, the United States (appellants) entered into a written contract with W. C. Briddell Company for the construction of a bridge over Rock Creek at L Street, Northwest, in the City of Washington. Appellee Cunningham is receiver of the Briddell Company. The contract provided that the work should be completed on July 17, 1932, failing which the United States were authorized to take over the work and prosecute it to completion, holding the contractor for any excess cost, or to permit the contractor to continue the work to completion and then to collect an agreed amount of "liquidated damages". On September 12, 1932, nearly two months after the expiration date, the work not then being completed, the United States terminated the contract, and in the final settlement with Briddell Company deducted from the contract price the excess cost of the

work and also liquidated damages for delay, amounting to \$2,030.-00. In September, 1938, appellee as receiver of Briddell Company brought suit under the Tucker Act to recover from the United States (1) the sum of \$3,358.02 damages caused by the failure of the United States to supply on time preliminary information called for under the contract; (2) the amount deducted by the United States for liquidated damages. The case was tried to the court without a jury, and judgment in the sum of \$4,949.80 entered for the plaintiff (appellee). Of this sum, \$2,919.80 represents damages due to failure of the United States to supply preliminary information under the contract, and \$2,030.00 the amount retained as liquidated damages. The question is whether either or both of the above mentioned sums were legally recoverable.

First. The contract provided that the work should be completed within 150 calendar days after notification to the contractor of the signing by the government contracting officer. By another clause, the United States agreed that prior to the beginning of the work they would establish at the site, for use and guidance of the contractor, fundamental alignment points and a bench mark. The claim on the first item in suit is for damages sustained by the contractor due to the failure, for a month and a half or more, to furnish this essential information. The trial court found there was delay by the United States and assessed damages in the sum of \$2,919.80. No question is here made as to the correctness of the amount, the defense of the United States being that damages were not recoverable in any amount, since the contractor had failed, as required by the contract, to give written notice of the delay. The applicable provision of the contract is: “* * * the contractor shall within ten days from the beginning of any such delay notify the contracting officer in writing of the causes of delay, who shall ascertain the facts and the extent of the delay, and his findings of facts thereon shall be final and conclusive on the parties hereto, subject only to appeal, within thirty days, by the contractor to the head of the department concerned, whose decision on such appeal as to the facts of delay shall be final and conclusive on the parties hereto.”

The lower court found that the contractor did not give the written notice, but did give oral notice shortly after the contract was awarded. * * *

This brings us, then, to consider whether oral notice admittedly given by the contractor was equivalent of a notification "in writing of the causes of delay". Obviously, the intent of this provision is to inform the government of the cause of delay and afford an opportunity to remove it, and likewise to warn the government of the intention of the contractor to insist upon it as a means of prolonging the stipulated time for completion of the work. Strangely enough, the question whether mere oral notice of delay is sufficient where the contract requires notice to be in writing appears not to have been raised or decided in any previous case involving such a contract. In *Plumley v. United States*, 226 U.S. 545, 33 S.Ct. 139, 57 L.Ed. 342, the contractor had agreed, as here, that no delay attributable to the government should be considered, unless the contractor had at the time notified the government "in writing of the facts and circumstances" and the Supreme Court said that failure to comply with the requirement would defeat the claim of the contractor. So in *Chapman Decorative Co. v. Security Mutual Life Ins. Co.*, 3 Cir., 149 F. 189, 191, the Court of Appeals said of a similar provision: "The parties made such an agreement, and thereby made it a law for themselves." To the same effect are *Feeley v. Bardsley*, 66 N.J. L. 239, 49 A. 443; *Curry v. Olmstead*, 26 R.I. 462, 59 A. 392; *Davis v. LaCrosse Hospital Ass'n*, 121 Wis. 579, 99 N.W. 351, 1 Ann. Cas. 950; and *Olson Construction Co. v. Commercial Bldg. & Investment Co.*, 127 Neb. 609, 256 N.W. 22. But in none of the above cases does it appear, as it does here, that verbal notice was given. However, in cases involving a provision requiring a written order for "extra work", it is almost universally held that a verbal order is insufficient. * * *

The reasoning in these cases seems to be that a provision in a contract of the nature we are discussing is a condition precedent, compliance with which must be shown; and this is true because it must be assumed that the parties in inserting the provision attached both value and importance to its precise terms. In such circumstances, "The court is not at liberty, either to disregard words used by the parties, descriptive of the subject-matter, or of any material incident, or to insert words which the parties have not made use of." *Harrison v. Fortlage*, 161 U.S. 57, 63, 16 S.Ct. 488, 489, 40 L.Ed. 616. See also *Norrington v. Wright*, 115 U.S. 188, 6 S.Ct. 12, 29 L.Ed. 366; *Filley v. Pope*,

115 U.S. 213, 6 S.Ct. 19, 29 L.Ed. 372. We are, therefore, of opinion that the trial court erred in including the amount of this item in its judgment.

[On the issue of the \$2,030 retained as liquidated damages for the contractor breach, the court then held that the United States, by electing to terminate the contract and itself complete the work, could not thereafter treat the contract as still in force and claim damages for breach.]

SECTION 3.—ANTICIPATORY BREACH AS EXCUSE FOR NONPERFORMANCE

1. IN GENERAL

The effect of renunciation of a contract by one of the parties before the time of performance is (1) to excuse the other party from further performance, and (2) to give him an immediate right to sue for damages, without waiting for the time of performance to arrive. This is the doctrine of anticipatory breach; and it is founded upon the theory that the mutual promises of the parties to any contract carry with them implied promises to maintain the contractual relation up to and including the time for performance. It is for the breach of this implied promise that the action is maintained.

O'NEILL v. SUPREME COUNCIL, AMERICAN LEGION OF HONOR.

Supreme Court of New Jersey, 1904.
70 N.J.L. 410, 57 A. 463, 1 Ann.Cas. 422.

[Action by Thomas O'Neill against the Supreme Council, American Legion of Honor, for breach of contract of insurance. It appears from the facts that in 1891 the defendant entered into a contract of insurance with the plaintiff whereby the defendant, in consideration of the payment of annual premiums by the plaintiff, agreed to pay into plaintiff's estate upon his death the sum

of \$5,000; that in 1901, after the contract had been in operation for ten years and plaintiff had faithfully made payments of the premiums due during the period, defendant has repudiated the contract, and now refuses to pay the said sum to plaintiff's estate in the event of plaintiff's death, and refuses to accept from plaintiff any further payment of premiums, and refuses to recognize the contract as still in force. For which alleged breach of contract, this action is brought.]

PITNEY, J. * * * [The question for consideration is whether under these facts there has been any actual breach of contract.] The cause of action asserted is not the right to recover the sum named in the benefit certificate according to its terms, but to recover damages for a renunciation of the agreement, by the party bound, in advance of the time set for performance.

Numerous reported decisions have laid down. * * * that where * * * one party [to a contract] either disables himself from performing, or prevents the other from performing, or repudiates in advance his obligations under the contract, and refuses to be longer bound thereby, communicating such repudiation to the other party, the latter party is not only excused from further performance on his part, but may at his option treat the contract as terminated for all purposes of performance, and maintain an action at once for the damages occasioned by such repudiation, without awaiting the time fixed by the contract for performance by the defendant. This doctrine has been followed in the English courts for more than a half century. * * *

In the leading case of *Hochster v. De La Tour* [(1853) 2 El. & B. 678, 22 L.J.Q.B. 455, 17 Jur. 972, 6 Eng.Rul.Cas. 576], Crompton, J., said, during the argument: "When a party announces his intention not to fulfill the contract, the other side may take him at his word and rescind the contract." * * * The same rule prevails in the Supreme Court of the United States. *Roehm v. Horst* (1899) 178 U.S. 1, 20 S.Ct. 780, 44 L.Ed. 953, where numerous * * * decisions of the same court are cited. And the great weight of authority in the state courts is to the same effect. * * *

The doctrine of *Hochster v. De La Tour* is generally recognized by the text-writers as established law. * * * So far as observed, the only states dissenting from the doctrine are Mass-

achusetts, Nebraska, and North Dakota. Daniels v. Newton, 114 Mass. 530, 19 Am.Rep. 384; Carstens v. McDonald, 38 Neb. 858, 57 N.W. 757; * * * Stanford v. McGill, 6 N.D. 536, 72 N.W. 938, 38 L.R.A. 760. * * *

The general question of repudiation of contracts is ably discussed by Prof. Williston in 14 Harv.L.Rev. 317, 421, with an ample citation of cases. He combats the doctrine of Hochster v. De La Tour, while conceding that it is sustained by the great weight of authority. * * *

Upon the whole, we are satisfied that the doctrine [of anticipatory breach] is well founded in principle as well as supported by authority. We are also clear that it applies to such a contract as the one in suit; and that the declaration sets forth a renunciation so clear and unequivocal as to give ground for an action, it being averred that the defendant has declared to the plaintiff that it will not perform the contract, and has refused to accept the [premiums] tendered by the plaintiff in performance of conditions precedent on his part. * * *

The plaintiff is entitled to judgment.

2. LIMITATIONS ON THE DOCTRINE OF ANTICIPATORY BREACH

(a) *Does Not Apply to Promises to Pay Money*

The doctrine of anticipatory breach has never been applied to promises to pay money. A note due at a certain time can be sued on only when the due date arrives; no repudiation by the debtor in advance of the time of performance can give any immediate right of action to the creditor.

(b) *Where One Party Repudiates the Contract in Advance of the Time of Performance, the Other Party Cannot Continue His Performance and Increase the Damages*

Although neither party has the right to break a contract, still he has the power to do so, subjecting himself thereby to an action for damages the measure of which will be the amount of profit

the other party would have made had the contract been kept open. But after a renunciation, the other party may not disregard it, continue performance, and after completion sue for the contract price. The reason is that damages are compensatory; the defendant is fairly to be held liable only for so much of the loss as is occasioned by his own act. For so much of the loss as was caused by the plaintiff's own failure to act reasonably in the circumstances, the defendant is not liable. This is the doctrine of avoidable damages. In the case of anticipatory breach; the aggrieved party is only entitled to the profit he has lost; he is not entitled in addition to the cost of the labor and materials he put into the manufacture *after* he received notice of the defendant's repudiation.

CLARK v. MARSIGLIA.

Supreme Court of New York, 1845. 1 Denio 317, 43 Am.Dec. 670.

[Action on a contract for work, labor and materials, in cleaning, repairing and improving sundry paintings belonging to defendant. The plaintiff proved that a number of paintings were delivered to him by the defendant to clean and repair at an agreed price of two hundred and thirty-one dollars. The defendant gave evidence tending to shew that after the plaintiff had commenced work upon them, he desired him not to go on, as he had concluded not to have the work done. The plaintiff, notwithstanding, finished the cleaning and repairing of the pictures, and claimed to recover for the whole, insisting that the defendant had no right to countermand the order which he had given. The defendant's counsel requested the court to charge that he had the right to countermand his instructions for the work, and that the plaintiff could not recover for any work done after such countermand. The court declined to charge as requested, but, on the contrary, instructed the jury that inasmuch as the plaintiff had commenced the work before the order was revoked, he had a right to finish it, and to recover the entire contract price.]

PER CURIAM. * * * The plaintiff was allowed to recover as though there had been no countermand of the order; and in this the court erred. The defendant, by requiring the plaintiff to stop work upon the paintings, violated his contract, and thereby in-

curred a liability to pay such damages as the plaintiff should sustain. Such damages would include a recompense for the labor done and materials used, and such further sum in damages as might, upon legal principles, be assessed for the breach of the contract; but the plaintiff had no right, by obstinately persisting in the work, to make the penalty upon the defendant greater than it would otherwise have been.

To hold that one who employs another to do a piece of work is bound to suffer it to be done at all events, would sometimes lead to great injustice. A man may hire another to labor for a year, and within the year his situation may be such as to render the work entirely useless to him. The party employed cannot persist in working, though he is entitled to the damages consequent upon his disappointment. So if one hires another to build a house, and subsequent events put it out of his power to pay for it, it is commendable in him to stop the work, and pay for what has been done and the damages sustained by the contractor. He may be under a necessity to change his residence; but upon the rule contended for, he would be obliged to have a house which he did not need and could not use. In all such cases the just claims of the party employed are satisfied when he is fully recompensed for his part performance and indemnified for his loss in respect to the part left unexecuted; and to persist in accumulating a larger demand is not consistent with good faith towards the employer. The judgment must be reversed, and a *venire de novo* awarded.

Judgment reversed.

SECTION 4.—WAIVER AS EXCUSE FOR BREACH OF CONDITIONS

Although a part performance or a defective performance of the duties of a party to a contract is not a sufficient compliance with the terms of a contract to enable the one thus partially or defectively performing to maintain an action against the other party for nonperformance of such other's duties under the contract, after one party has performed the contract in substantial part, and the

other party has accepted and had the benefit of such part performance and has clearly waived his right to an exact and full performance, such other may be precluded from relying upon the performance of the residue as a condition precedent to his liability.

A "waiver" is the intentional relinquishment of a known right. A breach of a term in a contract amounting to a condition precedent to a party's liability gives such aggrieved party a right to consider the contract at an end and sue for damages for the breach. The right to treat the contract as at an end may be waived without a new consideration.⁸ Voluntary acceptance of a part performance, knowing that the contract was not being fully performed, will amount to such waiver. On the other hand, the right to *damages* for the breach can only be waived (so as to make the waiver binding, that is) for a new consideration.

DOUGLASS & VARNUM v. VILLAGE OF MORRISVILLE.

Supreme Court of Vermont, 1915. 89 Vt. 393, 95 A. 810.

[Action by Douglass & Varnum, general contractors, for the contract price of a dam and spillway constructed by the plaintiffs for defendant.]

WATSON, J. * * * * It appeared that on July 2, 1906, the village of Morrisville, by its water and light commissioners, entered into a written contract with the plaintiffs, Douglass & Varnum, containing provisions material to be noticed, as follows:

"The said Douglass & Varnum agree to construct a concrete masonry dam and steel penstock and to furnish all labor and material and perform all work called for in specifications hereto attached and in plans used in connection therewith, for the im-

⁸ "Although conditions precedent must be performed, and a partial performance is not sufficient, yet when a contract has been performed in a substantial part, and the other party has voluntarily received and accepted the benefit of the part performed, the latter may be thereby precluded from relying on the performance of the res-

idue as a condition precedent to his liability to pay for what he has received, and may be compelled to rely upon his claim for damages in respect to the defective performance." Wiley v. Inhabitants of Athol, 150 Mass. 426, 23 N.E. 311, 6 L.R.A. 342, per Field, J.

provement of the electric light and power plant for the village of Morrisville at Cadys Falls, in the town of Morristown, Vermont, for the price of fifty thousand, seven hundred and twenty-seven dollars and eighty cents (\$50,727.80).

"Said work shall be undertaken and performed under all the terms and conditions of the specifications hereto attached, with the following exceptions:

"The work shall be performed according to the plans and drawings prepared by H. M. McIntosh, which plans and drawings are made a part of this contract, except that such part of the dam as is west of the spillway shall be built to an elevation of 106.35 instead of 108.35 as shown on said plans. * * *

"Contractors submitting bids or tenders on this work are expected to compare plans and specifications with the site and no demands or allowances shall be made on account of any misunderstanding of the plans and specifications.

"No estimates of quantities will be furnished by the owners, but the contractor must examine the plans and specifications, comparing them with the site, and the lump sum bid must cover the total expense of securing a proper foundation and building the work specified to lines and levels and in the manner called for in the plans and specifications. * * *

[Plaintiffs are here suing for the contract price of \$50,000 for completion of the dam and spillway in accordance with the terms of the written agreement; and also for the sum of \$17,118.05 for extra work performed in connection with necessary excavation and concrete filling of a portion of the river bed for the foundation of the dam. Defendant maintains that the said excavation and concrete fill were included within the scope of the contract and therefore do not constitute extra work; and further, that even though the said work be construed as not included in the contract, plaintiff cannot recover therefor, for the reason that no order in writing authorizing such extra work was obtained by the plaintiff as required by the following clause of the contract:]

"Any work which may be found necessary to perform that is not covered by this specification and the contract, must be covered by an order in writing by the owners or their representatives and will be paid for at actual cost, plus 10 per cent.

"No allowance or payment will be made for any work performed, or material furnished, not covered by the contract or such order." * * *

The bill of exceptions further states that it appeared that the surface of the river bottom at the site of the proposed dam, and for a considerable distance north and south, appeared to one making an inspection, by merely gazing at it, to be ledge, and that the banks of the river at said site, for a considerable distance north and south, the east bank, and the country for some distance west of the west bank, showed ledge formation that frequently came to the surface; that neither party, before executing the contract evidenced by said exhibits, ever made any borings or other endeavor to ascertain the quality of the river bottom or any part of the site of the proposed dam, * * * except to stand on the bank of the river in that vicinity and discover what could be seen there by mere inspection, and except that, before the execution of the contract, George Badger informed plaintiffs of the soundings made through the ice March 9, 1906, and surface levels taken, as hereinafter stated, and that those were indicated on the profile line; that plaintiffs began the work of constructing the dam shortly before July 2, 1906, and during the progress of that work, which was begun from the west side, it was discovered that the ledge apparently forming the river bottom dipped at a point a little west of the center of the stream, forming the large fissure or pocket here in question; that this pocket was full of a substance unsuitable for the foundation of a dam, which required excavation and filling with concrete masonry in order to construct a suitable dam for the purpose required by the defendant, whereupon plaintiffs excavated the pocket and filled it with such masonry, for which they charged defendant \$17,118.05. * * *

It also appeared from plaintiffs' evidence as to the facts above recited that, when the dam was finished, or considered by them to be finished, the plaintiffs' foreman and the inspector, Mr. Slayton, and all the members of the commission, except Judge Powers, went to the headgates and the water was let into the penstock, and immediately afterwards the machinery of defendant's plant was connected and ever thereafter continued in operation; that lines of wire have been connected with the power house, and the same have been used by defendant for municipal

lighting, etc., and for commercial purposes, without cessation.
* * *

All the evidence in the case tending to show that at the time of the execution of the contract and afterwards, as the work progressed, the commissioners understood that by the terms of the contract the foundation of the dam was to be constructed substantially on the bed of the river shown by the lines and levels on Exhibit B, fourth page, as claimed by the plaintiffs, also had a bearing on the question of whether the commissioners waived the provision of the specifications requiring that extra work found necessary to perform must be covered by an order in writing by the owners or their representatives, to entitle the contractors to an allowance or payment for such work performed, or material furnished. If the commissioners understood that the foundation of the dam was, by the terms of the contract, to be constructed substantially on the bed of the river, as claimed by the plaintiffs, then they must have known that the work of excavating the pocket and filling the same, a work of such magnitude and expense, found necessary to perform, was not covered by the specifications and the contract, and they must have further known that this work was not covered by any order in writing by the owners or their representatives, but was covered by a verbal order given by the inspector under their direction or acquiescence. The evidence further tended to show, that having such knowledge, the commissioners, during this work of excavating and filling the pocket, made no objection thereto, and subsequently accepted the benefits thereof. In discussing the sufficiency of the pleadings when this case was here before (84 Vt. 302, 79 A. 391) we said:

"And when, by its inspector, it (defendant) stood by day after day and saw the work go on without objection, and was content to let it continue until finally completed, knowing that no such order (in writing) had been given, and also knowing, as it must have known, that the plaintiffs were expecting extra compensation therefor, and then receiving and accepting the completed structure without objection, and ever since using the same as its own, it must be taken to have waived its right in respect of such an order."

The plaintiffs' evidence tended to show nearly a dozen instances, other than that of excavating and filling the pocket,

when they performed work and furnished materials not covered by the specifications and the contract, under verbal directions by the inspector, concerning which no claim was made that they were not so directed, nor that they were not extras, and that sometimes, when such directions were given, some of the commissioners were present and heard them given, and sometimes they were not; that the extra work done and materials furnished in more or less of these instances were estimated by the engineer, as extras, during the progress of the work under the written contract, and, as to four of the instances, the amounts charged were conceded to be correct, the only defense being that they were not covered by an order in writing. Yet the record shows no instance of extras being covered by such an order.

A waiver may be inferred from an order to perform extra work under such circumstances as imported a promise to pay therefor. *Bartlett v. Stanchfield*, 148 Mass. 394, 19 N.E. 549, 2 L.R.A. 625. It has been held that where the owner requested the contractor, without writing, to furnish a large number of items of work and materials and the same were furnished by the contractor and accepted by the owner, and part of them were paid for, a provision in the contract that the contractor would make no charge for extra work unless ordered in writing by the owner or its engineer was waived. *Kilby Mfg. Co. v. Hinchman-Renton Fire Proofing Co.*, 132 F. 957, 66 C.C.A. 67; *McGrath Constr. Co. v. Waupaca-Green Bay R. Co.*, 148 Wis. 372, 134 N.W. 824; *Schmulbach v. Caldwell*, 196 F. 16, 115 C.C.A. 650; *O'Keefe v. St. Francis' Church*, 59 Conn. 551, 22 A. 325. In *Davis v. La Crosse Hospital Ass'n*, 121 Wis. 579, 99 N.W. 351, 1 Ann.Cas. 950, it was said:

“If, under a contract containing such a provision, a builder were requested to and did perform extra work of such magnitude that the idea that it was intended he should have no additional pay therefor would appear highly unreasonable or absurd, a court might, nothing appearing to the contrary, conclude that there was a mutual intention to waive such provision.”

The fact that throughout the performance of the work called for by the written contract, the commissioners entirely disregarded the stipulation therein as to the form of the orders for extra work or materials, the order given in every instance being verbal, taken with the other evidence bearing upon the question, was

sufficient to justify a finding of a general waiver, an intentional relinquishment altogether, by the commissioners, of the provision requiring orders for such work and materials to be in writing. *Meyer v. Berlandi*, 53 Minn. 59, 54 N.W. 937. * * *

The question of waiver was one of fact for the jury to determine. *Findeisen v. Metropole Fire Ins. Co.*, 57 Vt. 520. The effect of such a waiver, if established, was to strike out the two words "in writing," leaving the wording of the rest of the contract unchanged and in force (*Young v. Jeffreys*, 20 N.C. 357; *O'Loughlin v. Poli*, 82 Conn. 427, 74 A. 763), and then any form of order by the owners or their representatives was sufficient, and any extra work found necessary to perform, covered by an order (verbal or otherwise) from the proper source, in the language of the specifications "will be paid for at actual cost, plus 10 per cent." With the said two words "in writing" thus eliminated, the provisions of the second clause under the same heading, "Extra Work," in the specifications, are none the less applicable; for then, as before, the last two words therein "such order," have reference to the kind of order required by the first clause. In such circumstances, the provision that the extra work "will be paid for at actual cost, plus 10 per cent.," constitutes an express promise to pay therefor, and fixes the manner of arriving at the amount. Consequently no occasion arises for discussing the question of an implied promise. * * *

The ground presented by subdivision "d" was the failure to complete the work within the time specified in the contract. Yet this does not defeat the plaintiff's right of recovery; for the defendant allowed the work to go on after the expiration of the time limited the same as before, with its inspector in charge, thereby treating the contract as still in force. This was a waiver of strict performance as to time, and, although in the circumstances of this case the defendant may or may not be entitled to a reduction for damages suffered by reason of the delay, it cannot by this technical objection defeat the action. *Smith v. Smith*, 45 Vt. 433; *Foster v. Worthington*, 58 Vt. 65, 4 A. 565.

The motion for a directed verdict was properly overruled.

* * * *

⁹ The dissenting opinion of Taylor,
J., in which Munson, C. J., concurs,
is omitted.

McKENNA v. VERNON.

Supreme Court of Pennsylvania, 1917. 258 Pa. 18, 101 A. 919.

STEWART, J. This was an action to recover a balance alleged to be due on a building contract. By written agreement under date of January 20, 1914, the plaintiff undertook the erection and completion of a moving picture theater at 1526-28 Cumberland street in the city of Philadelphia, agreeably to certain plans and specifications which accompanied and were made part of the agreement, he to receive therefor, in full compensation, the sum of \$7,750, to be paid by the owner to the contractor wholly upon certificates of the architect as follows: Eighty per cent. of the work set in place as the work proceeds, the first payment within 30 days after the completion of the work; all payments to be due when certificates of the same shall have been issued by the architect; the building to be completed by April 20, 1914, and the work to be done under the direction of the architect. A supplemental agreement was entered into by the parties March 24, 1914, which provided for an enlargement of the theater building, for which the contractor was to receive an additional \$1,000. The main provisions of this agreement were similar to those contained in the earlier. By the later agreement the work was to be completed on or before the 11th of May, 1914. From time to time, as the work progressed, the owner made several payments on account, amounting in all to \$6,000. Suit was brought, August 28, 1914, to recover the balance of \$2,750, with interest from June 30, 1914. Defense was made on several grounds: Failure of contractor to erect and complete the building in accordance with the plans and specifications, the substituting of inferior and cheaper materials, and inferior workmanship throughout, entailing, for the supply and correction of the same, if attempted, a large expenditure. Further, defendant claimed that the building was not completed within the time allowed by the contract, and demanded as a set-off a penalty of \$283.35. The trial resulted in a verdict for the plaintiff for \$2,500. At the conclusion of the evidence, the defendant asked for a compulsory nonsuit, which was refused.

The several assignments of error, in one form and another, relate directly or indirectly to this one feature of the case, and are

all based on the theory that, in the absence of a certificate from the architect of the final completion of the building in accordance with plans and specifications, no right of action existed. Not only is there no express provision to this effect in the contract, but the contract itself shows that no distinction is there made between final payment and the payments on account of the 80 per cent. of work in place. All payments were to be made only on certificate of the architect, and yet with a single exception each of the seven payments made as the work progressed was made without a certificate being asked for. With such constant and repeated disregard on the part of the owner to exact compliance with this provision in the contract, it is too late now for him to insist that failure on the part of the plaintiff to secure such certificate before suit defeats his right of action. Furthermore, on the trial, the architect, called as a witness, testified that the plaintiff had performed substantial compliance with all the requirements of the contract, that he had not given the certificate to this effect only because it had not been asked for, and that whatever variations there were from the specifications were authorized and directed by him. The provision in the contract for written certificates from the architect is for the benefit and protection of the owner. If he waived it repeatedly, as he did here, during the progress of the work, he cannot complain if he be held to have waived it when he seeks to defend against a final payment for work shown to have been honestly and substantially performed, especially when almost daily he has had the work under his own observation, without remonstrance or complaint at any time with respect to either the work done or materials employed. This being the situation, the court was entirely right in refusing the nonsuit.

* * * 10

10 The subject of waiver is of the utmost practical importance, particularly in connection with construction contracts. Breaches of conditions precedent are frequently waived by the action of the aggrieved party in continuing with the contract as though it were still in force; that is, a breach of condition which would discharge the other party if at once

treated by him as a discharge, will not have this effect if he goes on with the contract instead of repudiating it; in such case he can only recover his damages. Conditions of architect's certificates, written orders for extra work, time of performance, are those most frequently waived, either expressly, or as in the above cases, impliedly by action or conduct.

GENERAL SUPPLY & CONSTRUCTION CO. v. GOELET et al.

Court of Appeals of New York, 1925. 241 N.Y. 28, 148 N.E. 778.

LEHMAN, J. On or about the 22d day of August, 1906, the plaintiff entered into a written contract with the defendant Goelet, whereby the plaintiff obligated itself to provide all the material and perform all the work for the erection of the "mason work, structural iron and steel work, and carpenter work" in connection with a building on premises owned by Goelet. The contract provided that:

"The entire building is to be completely finished and shall be ready for occupancy on or before the 1st day of July, 1907, and in default thereof the contractor shall pay to the owner the sum of two hundred dollars as liquidated damages for each and every day that the said building shall remain uncompleted and unfinished, and not ready for occupancy, after the date above mentioned."

The work was not completed on July 1, 1907, and the plaintiff was permitted by the owner to continue performance of the work. The owner thereby waived time as an essential element of the contract (*Taylor v. Goelet*, 208 N.Y. 253, 101 N.E. 867, Ann. Cas. 1914D, 284); but none the less the failure to complete at the time fixed in the contract constitutes a breach and gives rise to a cause of action for damages caused by the delay (*Deeves & Son v. Manhattan Life Ins. Co.*, 195 N.Y. 324, 88 N.E. 395). The work was still far from finished on March 23, 1908, and on that date the owner, against the plaintiff's protest and resistance, ejected the plaintiff from the premises and prevented it from proceeding with the work under the contract. The Appellate Division has made a finding that at that time the defendant Goelet was justified in concluding that the plaintiff would not, within any reasonable time, finish the work of erecting the building.

The continual delays of the contractor in the past might perhaps reasonably give rise to the inference that it would not proceed with reasonable speed in the future. We may assume that, at the time the owner put the contractor off the work, he had, with reason, ceased to hope or expect that the contractor would mend his ways; yet the owner had no right to terminate the contract in the manner he did. He had provided in the contract pro-

tection for himself against unreasonable delays on the part of the contractor, first, by stipulating that the work must be completed by a definite date; second, by provision for stipulated damages for each day's delay in the completion of the work after that date; third, by provision that the owner might terminate the contract at any time upon certificate of the architect that the work was being unreasonably delayed, and that such delay was sufficient ground for termination of the contract. He terminated the contract and ejected the contractor, not for failure to complete the work in the contract time, but for unreasonable delay thereafter, and he failed to comply with the provision of the contract which made the architect's certificate a condition precedent to the right to take such action.

Though he may have been justified, as the Appellate Division has held, in his belief that the contractor would not thereafter mend his ways and finish the work within a reasonable time, yet, where such delay did not amount to abandonment, he could not rescind the contract for that reason, except according to its terms. He was not left entirely at the mercy of a dilatory contractor, even if the architect did not find and refused to certify that the contractor's delays were sufficient ground for termination. Though time was waived as an essential element of the contract, it could be restored by notice to complete within a reasonable time, stated in said notice. *Taylor v. Goelet*, *supra*. Having indicated purpose to keep the contract alive in spite of delays on the part of the contractor, the owner could not suddenly abandon the purpose and treat as essential an element in the contract which he had previously waived, as ground for termination. *Brede v. Rosedale Terrace Co.*, 216 N.Y. 246, 110 N.E. 430. The termination of the contract in this case, without the required previous notice, and without a certificate from the architect in accordance with the terms of the contract, was wrongful. * * *

The substantial dispute between the parties upon this appeal concerns the question of whether the owner, in spite of his refusal, which we must hold was wrongful, is entitled to offset or counterclaim for damages suffered by the plaintiff's failure to complete the work at the time fixed in the contract.

* * * On July 1, 1907, the plaintiff was in default under his contract. That default gave rise to a claim for damages caus-

ed by the delay of the contractor, and a right to terminate the contract. Failure to enforce the right to terminate the contract promptly constitutes to that extent a waiver of the default, but we have repeatedly held that it constituted no waiver of the claim for damages. Speed or delay on the part of the contractor in thereafter completing the work might diminish or increase the consequential damages suffered by the owner through the contractor's failure to complete at the stipulated time, but no speed could wipe out completely the contractor's failure to comply with his contractual obligation, nor deprive the owner of his right to consequent damages. The value of completion of the contract thereafter would be less than its value at the stipulated time. The time of ultimate completion merely fixes the amount of damages; the basis of the cause of action is the breach of the contractor's obligation to complete at the earlier date. When the contractor was put off the work, the owner had suffered damage by the failure of the contractor to complete eight months before, during which time the owner lost the use of the building. Nothing the contractor was prevented from doing, or could possibly do, would wipe out the damage. * * *

The plaintiff herein, asking for the reasonable value of the work, is entitled to recover that value only, subject to the owner's right to a set-off in the amount of the damage caused to him by failure to do that work within the time allowed by contract, regardless of whether or not the owner wrongfully prevented the plaintiff from completing the contract thereafter. The contractor is entitled to damages for such breach by the owner; the owner is entitled to damages for previous default by the contractor, which could not be affected in any way by the owner's breach, nor reduced below the amount then fixed by the passage of time.

[Judgment accordingly.]

SECTION 5.—IMPOSSIBILITY AS EXCUSE FOR NON-PERFORMANCE

Impossibility of performance arising subsequent to the formation of a contract does not discharge the promisor, except—

EXCEPTIONS: (1) Where the impossibility is occasioned through change in law;

(2) Where by reason of destruction of the subject matter, whose continued existence is essential to performance, such becomes impossible;

(3) Impossibility because of sickness or death, in personal service contracts;

(4) In some jurisdictions, where conditions essential to performance are found not to exist, the promisor is excused from his obligation to perform.

Impossibility of performance obvious on the face of the contract, or already illegal by existing law, affects the formation of the contract; and here there is of course no question of discharge for no real contract was ever entered into. If a thing is obviously impossible, a promise to perform it does not afford a consideration for a contract. Or if it is illegal a promise to do an illegal act is void.

The situation which we have now under consideration is that in which a valid contract has been made but has become impossible of performance because of facts arising subsequent to its formation. The general rule is that impossibility is no excuse. If the thing contracted for is possible in itself, and the contractor has failed to condition his liability expressly, there can be no excuse on the ground of subsequent impossibility, because he might have provided for the contingency in his contract.

There are, however, certain classes of cases in which by the very nature of the situation the courts hold that the parties have impliedly conditioned their undertaking upon performance being possible. Failure of such condition of course excuses nonperformance. It remains to consider these types of cases.

STEES et al. v. LEONARD.

Supreme Court of Minnesota, 1874. 20 Minn. 494.

The defendants, who are architects and builders, having at plaintiffs' request, furnished them with plans and specifications for a building proposed to be erected by them on their own land, afterwards, and on the 18th August, 1868, the plaintiffs and defendants made and executed a contract under seal, in which they are all described as "of the city of St. Paul," etc. By the terms of the contract, the defendants "agree to and with the said John A. and Washington M. Stees, to well and truly build; erect, and complete the three-story business house proposed to be erected by the said J. A. & W. M. Stees, on Minnesota street, between Third and Fourth streets; all in accordance with the plans and specifications of the same, with such alterations as are mentioned in said specifications, prepared by M. Sheire & Bro., architects, and signed by both parties; the building, with the exception of painting, to be completed on or before the 1st day of January, 1869. * * *

The defendants entered upon the performance of the contract and erected the proposed building to a height of three stories, when it fell to the ground, on the 1st November, 1868. In the following year the defendants again attempted to perform the contract, and again erected the building to the same height as before, when it again fell, on the 1st August, 1869, whereupon the defendants abandoned the work, and refused to perform the contract. [The plaintiffs then brought this action and demanded judgment.] * * * for the sum of \$5,214.80, with interest, as the damages sustained by the plaintiffs; being \$3,745.80 paid, pursuant to the contract, during the progress of the work, \$1,000 as damages for loss of the use of the lot on which the building was to be erected, and \$469, as damages occasioned by the fall of the building, to an adjacent house of plaintiffs and property stored therein. * * *

At the trial in the district court for Ramsey county, the defendants made the following offers of proof: * * *

That in architecture and building, "footings," when used in a building, are the lowest portion of the structure, and the only

artificial foundation employed for the building, when footings are employed.

That they constructed each of these buildings that fell, in all respects as required by the contract and specifications.

The evidence thus offered * * * was objected to as incompetent, irrelevant, and immaterial, and in each case the objections were sustained, and the defendants excepted.

The jury found for the plaintiffs. The defendants moved, upon a bill of exceptions, for a new trial, and appeal from the order denying their motion.

YOUNG, J. The general principle of law which underlies this case is well established. If a man bind himself, by a positive, express contract, to do an act in itself possible, he must perform his engagement, unless prevented by the act of God, the law, or the other party to the contract. No hardship, no unforeseen hindrance, no difficulty short of absolute impossibility, will excuse him from doing what he has expressly agreed to do. This doctrine may sometimes seem to bear heavily upon contractors; but, in such cases, the hardship is attributable, not to the law, but to the contractor himself, who has improvidently assumed an absolute, when he might have undertaken only a qualified liability. The law does no more than enforce the contract as the parties themselves have made it. Many cases illustrating the application of the doctrine to every variety of contract, are collected in the note to Cutter v. Powell, 2 Smith Lead.Cas. 1. * * *

The rule has been applied in several recent cases, closely analogous to the present in their leading facts. In Adams v. Nichols, 19 Pick., Mass., 275, 31 Am.Dec. 137, the defendant Nichols contracted to erect a dwelling-house for plaintiff on plaintiff's land. The house was nearly completed when it was destroyed by accidental fire. It was held that the casualty did not relieve the contractor from his obligation to perform the contract he had deliberately entered into. The court clearly state and illustrate the rule, as laid down in the note to Walton v. Waterhouse, 2 Wms.Saunders, 422, and add: "In these and similar cases, which seem hard and oppressive, the law does no more than enforce the exact contract entered into. If there be any hardship, it arises from the indiscretion or want of foresight of the suffering

party. It is not the province of the law to relieve persons from the improvidence of their own acts."

In *School Dist. No. 1 v. Dauchy*, 25 Conn. 530, 68 Am.Dec. 371, the defendant contracted to build and complete a schoolhouse. When nearly finished, the building was struck by lightning, and consumed by the consequent fire, and the defendant refused to rebuild, although plaintiffs offered to allow him such further time as should be necessary. It was held that this nonperformance was not excused by the destruction of the building. The court thus state the rule: "If a person promise absolutely, without exception or qualification, that a certain thing shall be done by a given time, or that a certain event shall take place, and the thing to be done, or the event, is neither impossible nor unlawful at the time of the promise, he is bound by his promise, unless the performance, before that time, becomes unlawful."

Superintendent, etc., of Public Schools of City of Trenton v. Bennett, 28 N.J.L. 513, 3 Dutcher 513, 72 Am.Dec. 373, is almost identical in its material facts with the present case. The contractors agreed to build and complete a schoolhouse, and find all materials therefor, according to specifications annexed to the contract; the building to be located on a lot owned by plaintiff, and designated in the contract. When the building was nearly completed it was blown down by a sudden and violent gale of wind. The contractors again began to erect the building, when it fell, solely on account of the soil on which it stood having become soft and miry, and unable to sustain the weight of the building; although, when the foundations were laid, the soil was so hard as to be penetrated with difficulty by a pickaxe, and its defects were latent. The plaintiff had a verdict for the amount of the instalments paid under the contract as the work progressed. The verdict was sustained by the Supreme Court, which held that the loss, although arising solely from a latent defect in the soil, and not from a faulty construction of the building, must fall on the contractor.

In the opinion of the court, the question is fully examined, many cases are cited, and the rule is stated, "that where a party by his own contract creates a duty or charge upon himself, he is bound to make it good if he may, notwithstanding any accident by inevitable necessity, because he might have provided against it by his contract. * * * If before the building is completed

or accepted, it is destroyed by fire or other casualty, the loss falls upon the builder; he must rebuild. The thing may be done, and he has contracted to do it. * * * No matter how harsh and apparently unjust in its operation the rule may occasionally be, it cannot be denied that it has its foundations in good sense and inflexible honesty. He that agrees to do an act should do it, unless absolutely impossible. He should provide against contingencies in his contract. Where one of two innocent persons must sustain a loss, the law casts it upon him who has agreed to sustain it, or rather, the law leaves it where the agreement of the parties has put it. * * * Neither the destruction of the incomplete building by a tornado, nor its falling by a latent softness of the soil, which rendered the foundation insecure, necessarily prevented the performance of the contract to build, erect, and complete this building for the specified price. It can still be done, for aught that was opened to the jury as a defence, and overruled by the court."

In *Dermott v. Jones*, 2 Wall., U.S., 1, 17 L.Ed. 762, the foundation of the building sank, owing to a latent defect in the soil, and the owner was compelled to take down and rebuild a portion of the work. The contractor having sued for his pay, it was held that the owner might recoup the damages sustained by his deviation from the contract. The court refer with approval to the cases cited, and say: "The principle which controlled them rests upon a solid foundation of reason and justice. It regards the sanctity of contracts. It requires a party to do what he has agreed to do. If unexpected impediments lie in the way, and a loss ensue, it leaves the loss where the contract places it. If the parties have made no provision for a dispensation, the rule of law gives none. It does not allow a contract fairly made to be annulled, and it does not permit to be interpolated what the parties themselves have not stipulated."

Nothing can be added to the clear and cogent arguments we have quoted. * * * It is no defence to the action, that the specifications directed that "footings" should be used as the foundation of the building, and that the defendants, in the construction of these footings, as well as in all other particulars, conformed to the specifications. The defendants contracted to "erect and complete the building." Whatever was necessary to be done in order to complete the building, they were bound by the contract

to do. If the building could not be completed without other or stronger foundations than the footings specified, they were bound to furnish such other foundations. If the building could not be erected without draining the land, then they must drain the land, "because they have agreed to do everything necessary to erect and complete the building." (3 Dutcher, 520; and see Dermott v. Jones, *supra* [2 Wall., U.S., 1, 17 L.Ed. 762], where the same point was made by the contractor, but ruled against him by the court.)

As the draining of the land was, in fact, necessary to the erection and completion of the building, it was a thing to be done, under the contract, by the defendants. * * *

There was, therefore, no error in the exclusion of the evidence offered, and the order appealed from is affirmed.

(1) *Impossibility Because of Change in Law*

PABST BREWING CO. v. HOWARD.

Kansas City Court of Appeals, Missouri, 1919. 211 S.W. 720.

TRIMBLE, J. * * * This is a suit on a written contract to recover \$500 paid by the brewing company to defendant, a retail liquor dealer in Nevada, Mo., to help the latter in building a cold storage warehouse in said city, the defendant agreeing to buy for his retail trade the keg and bottled product of plaintiff exclusively for ten successive years from the date of the contract. If defendant quit business, or sold out, or for any reason ceased to purchase the product of plaintiff, he agreed to repay said \$500, less 10 per cent. discount per annum for such year or part thereof from the date of the contract during which the defendant bought plaintiff's product.

The \$500 was paid, and was used by defendant in building the warehouse as agreed; and, as agreed, he bought for his retail trade plaintiff's product exclusively for two years thereafter, and was willing to continue doing so, but, as the result of a local option election held in Nevada, it became unlawful to sell intoxicating

liquors therein, and defendant ceased doing so, and, of course, ceased buying plaintiff's product. In other words, the contract was lawful when made, but after it was executed, and defendant was in the performance thereof and willing to continue performing the same, performance thereof became impossible by force of law. In such cases nonperformance becomes excusable.

Judgment for defendant.

FISHER et al. v. UNITED STATES FIDELITY & GUARANTY CO.

Appellate Court of Illinois, 1942. 313 Ill.App. 66, 39 N.E.2d 67.

Action by Sadie Fisher and another against the United States Fidelity & Guaranty Company on a building construction bond. Judgment for plaintiffs, and defendant appeals.

Reversed and remanded.

O'CONNOR, J. By this appeal defendant, United States Fidelity & Guaranty Company, a corporation, seeks to reverse a judgment entered against it for \$45,000.

The record discloses that plaintiffs brought an action against Joe Goldberg, Inc., a corporation and United States Fidelity & Guaranty Company, a corporation, as principal and surety on a bond executed by them June 12, 1937, in which it was recited that the principal, Joe Goldberg, Inc., had entered into a written agreement with plaintiffs for the erection of a building on West Roosevelt Road, Chicago. The bond for \$64,000 was in the usual form providing that if the building was constructed the bond would be void, otherwise to remain in full force and effect.

Plaintiffs owned real estate known as 3715-3717 and 3719 West Roosevelt Road, Chicago, which was improved with a one-story building containing three stores. June 12, 1937, plaintiffs entered into a contract with Joe Goldberg, Inc., a corporation, as contractor, and the Road Theatre, Inc., as lessee, whereby Goldberg was to demolish the old building and construct a new one on the premises for \$64,000.

The new building was to be used as a motion picture theatre and two small stores. March 3, 1937, plaintiffs, as lessors and the Road Theatre, Inc., as lessee, entered into a written lease for a

building which was thereafter to be constructed. The lease covered a period of 20 years from October 1, 1937 to September 30, 1957, at a rental of \$264,000, payable in monthly installments of \$1,000 each for a certain period. Thereafter it was increased to \$1,200 per month and in addition the lease provided that in the event the gross income derived from the operation of the moving picture theatre was in excess of certain specified figures 10% of such excess should be paid as additional rent.

April 15, 1937, a permit was obtained from the Commissioner of Buildings for the construction of the new building. Plans and specifications for the building were agreed upon and July 7, 1937, Joe Goldberg, Inc., took possession of the property and demolished the old building except certain of the side walls which were to be used in connection with the construction of the new building in about a week. Thereupon Golberg, Inc., started to construct the new building when almost immediately it was stopped July 18, 1937, by the Commissioner of Buildings of the city on the ground that it was a violation of an ordinance of Chicago to construct the theatre because it was within 200 feet of a church and Goldberg was prohibited by the police from proceeding with the construction of the new building. A day or two later the parties met to see if the matter could not be adjusted so that the building might be constructed but while the building might legally be constructed, it was said it could not be operated as a moving picture theatre and thereupon the lessee, the Road Theatre, Inc., stated it was not interested in the lease unless it could operate the moving picture theatre. After some further negotiations the lease was cancelled December 9, 1937, apparently by agreement of all parties, and in the spring of 1938, plaintiffs erected a new building upon the premises consisting of 4 stores at a cost of \$28,000 which brought in a rental of \$500 per month. * * *

The harsh rule of law contended for by counsel for plaintiffs which would render the surety company liable on its bond, if the new building were not constructed because it could not be used for the purpose for which it was constructed and therefore a particularly useless expense would be incurred, has been somewhat relaxed. [Citations omitted.] In defining the impossibility of performance of contracts, § 454 of the Restatement states: "In the Restatement of this Subject impossibility means not only strict impossibility but impracticability because of extreme and

unreasonable difficulty, expense, injury or loss involved." And the "Comment" following this section is: "a. A statement that it is only when facts make performance impossible that they have the operation stated in this Chapter, and that it is not enough that they create extreme difficulty must be interpreted in order to be correct. 'Impossible' must be given a practical rather than a scientifically exact meaning. Impracticability rather than absolute impossibility is enough; and the words 'impossible' and 'impossibility' are used in the Restatement of this Subject with that meaning. Mere unanticipated difficulty, however, not amounting to impracticability is not within the scope of the definition." Professor Williston in § 1931 above cited, in discussing the development and nature of the modern defense of impossibility of performance of a contract says: "The law must adopt either a strict rule which will require the parties, when they form a contract, to foresee its consequences as accurately as possible, though at the expense of serious hardship to one of them if unforeseen circumstances render it impossible to perform his promise, or a rule giving an excuse under such circumstances. The early cases accepted the former alternative; the later cases tend to adopt the other." After stating the strict rule of enforcement of contracts and later the relaxation of the rule he continues: "the essence of the modern defense of impossibility is that the promised performance was at the making of the contract, or thereafter became, impracticable owing to some extreme or unreasonable difficulty, expense, injury, or loss involved, rather than that it is scientifically or actually impossible. While the mere fact that performance of a promise is made more difficult and expensive than the parties anticipated when the contract was made will not ordinarily excuse the promisor as is shown by cases too numerous for citation, nevertheless there are other decisions allowing an excuse where very greatly increased difficulty had been caused by facts not only unanticipated but inconsistent with the facts that the parties obviously assumed to exist or to be likely to continue. The true distinction is not between difficulty and impossibility. A man may contract to do what is impossible, as well as what is difficult, and be liable for failure to perform. The important question is whether an unanticipated circumstance has made performance of the promise vitally different from what should reasonably have been within the contemplation of both

parties when they entered into the contract. If so, the risk should not fairly be thrown upon the promisor."

In the instant case it is clear all parties were of opinion and assumed that the moving picture theatre could legally be constructed and operated on the property in question. A tripartite agreement was entered into between plaintiffs, the owners, the contractor, Joe Goldberg, Inc., a corporation, and the Road Theatre Company and a lease covering a period of 20 years was also executed between plaintiffs, as lessors, and the Road Theatre Company, as lessee. A permit was obtained from the City for the construction of the theatre and the bond in suit specifically refers to the tripartite agreement which in turn refers to the lease and the construction agreement entered into between plaintiffs and Goldberg, Inc. All of these documents must be construed together and when so construed we think it obvious no party anticipated that the construction of the theatre was in violation of any ordinance. The contract for the construction and operation of the building being in violation of the ordinance, was unenforceable. * * *

BROWN v. OSHIRO

District Court of Appeal, Second District, Division 2, California, 1943.
58 Cal.App.2d 190, 136 P.2d 29.

Action by Leon B. Brown and another, as trustee under the last will and testament of Anna D. Brown, deceased, and another, against Y. Oshiro for judgment declaring that compulsory evacuation of defendant, a Japanese, from the city of Los Angeles would not affect the rights and duties of the parties under a lease. From judgment for the plaintiffs, the defendant appeals.

Reversed with directions.

A. J. Wood, J. Plaintiffs by a written instrument leased to defendant, a Japanese, part of the premises located at the northeast corner of First street and Los Angeles street in the city of Los Angeles for the period beginning February 1, 1940, and ending January 31, 1944, at a monthly rental of \$175. In this action plaintiffs pray that a judgment be entered declaring that the compulsory evacuation of defendant from the city of Los Angeles will not affect the rights and duties of the parties under the lease.

Defendant has appealed from a judgment granting relief to plaintiffs as prayed. * * *

Defendant filed an answer in which he alleges that he had been ordered by competent authorities to leave Los Angeles and its vicinity, that he had no alternative but to comply with the order and that, as a consequence, it was impossible for him to comply with the terms and conditions of the lease. Defendant prays that a judgment be entered declaring that his obligations under the lease were terminated by the evacuation order. * * *

The rule which should be applied to the present action is stated in Restatement of the Law of Contracts, section 288: "Where the assumed possibility of a desired object or effect to be attained by either party to a contract forms the basis on which both parties enter into it, and this object or effect is or surely will be frustrated, a promisor who is without fault in causing the frustration, and who is harmed thereby, is discharged from the duty of performing his promise unless a contrary intention appears." This rule was followed in *Johnson v. Atkins*, 53 Cal.App.2d 430, 127 P.2d 1027, where it was held that a contract for the sale of copra for shipment to Colombia was terminated when the purpose of the purchase was frustrated by the cancellation by that country of permission for entry. It is apparent from the instrument now before us that the "desired object" of the parties was to provide "for conducting a hotel and renting office space". It cannot be determined from the record before us whether this object has in fact been "frustrated". The trial court did not find, and we are unable to determine whether the evacuation of the Japanese from the vicinity of the premises in question made it impossible to conduct a hotel or rent office space therein. The very location of the premises as regards its proximity to Japanese or non-Japanese establishments appears to be in doubt.

The issues presented should not be decided upon the incomplete factual record now before the court. Upon the going down of the remittitur the trial court should permit such amendments to the pleadings and such proof as will enable the court to accurately ascertain and declare the rights and obligations of the parties.

The judgment is reversed. Neither party to recover costs on appeal.

(2) *Impossibility Because of Destruction of the Subject Matter*

Where the continued existence of a specific thing is essential to performance of a contract, the courts read into the undertaking of the parties an implied condition that the specific thing remain in existence, so that its destruction operates as a discharge.

All contracts to repair a specific object are subject to the implied condition that the object remain in existence. And this is carried logically to the extent that where the repairs have been partially performed at the time the building is destroyed, there may be a recovery upon the contract for the pro rata price; for the destruction of the building operates as a discharge or excuse for the failure to complete said repairs, on the ground of impossibility.

On the other hand, where the contract is to construct rather than to repair a building, destruction of the uncompleted building will not discharge the contractor; there is here no "impossibility"; he must rebuild and complete his contract before he can recover the price or any part thereof.

BUTTERFIELD v. BYRON.

Supreme Judicial Court of Massachusetts, 1801.
153 Mass. 517, 27 N.E. 667, 12 L.R.A. 571, 25 Am.St.Rep. 654.¹¹

KNOWLTON, J. It is well established law that where one contracts to furnish labor and materials, and construct a chattel, or build a house, on land of another, he will not ordinarily be excused from performance of his contract by the destruction of the chattel or building without his fault before the time fixed for the delivery of it. Adams v. Nichols, 19 Pick., Mass., 275; Wells v. Calnan, 107 Mass. 514. * * * It is equally well settled that where work is to be done under a contract on a chattel or building which is not wholly the property of the contractor, or for which he is not solely accountable, as where repairs are to be made on the property of another, the agreement on both sides is upon the implied condition that the chattel or building shall continue in existence, and the destruction of it without the fault

¹¹ Statement of facts is omitted.

of either of the parties will excuse performance of the contract, and leave no right of recovery of damages in favor of either against the other. *Taylor v. Caldwell*, 3 Best & S. 826; *Lord v. Wheeler*, 1 Gray, Mass., 282; * * * *Walker v. Tucker*, 70 Ill. 527. In such cases, from the very nature of the agreements as applied to the subject-matter, it is manifest that, while nothing is expressly said about it, the parties contemplated the continued existence of that to which the contract relates. The implied condition is a part of the contract as if it were written into it, and by its terms the contract is not to be performed if the subject-matter of it is destroyed, without the fault of either of the parties, before the time for complete performance has arrived.

The fundamental question in the present case is, what is the true interpretation of the contract? Was the house, while in the process of erection, to be in the control and at the sole risk of the defendant, or was the plaintiff to have a like interest as the builder of a part of it? Was the defendant's undertaking to go on and build and deliver such a house as the contract called for, even if he should be obliged repeatedly to begin anew on account of the destruction again and again of a partly completed building by inevitable accident, or did his contract relate to one building only, so that it would be at an end if the building, when nearly completed, should perish without his fault? It is to be noticed that his agreement was not to build a house, furnishing all the labor and materials therefor. His contract was of a very different kind. The specifications are incorporated into it, and it appears that it was an agreement to contribute certain labor and materials towards the erection of a house on land of the plaintiff, towards the erection of which the plaintiff was to contribute other labor and materials, which contributions would together make a completed house. The grading, excavating, stone-work, brick-work, painting, and plumbing were to be done by the plaintiff. Immediately before the fire, when the house was nearly completed, the defendant's contract, so far as it remained unperformed, was to finish a house on the plaintiff's land, which had been constructed from materials and by labor furnished in part by the plaintiff and in part by himself. He was no more responsible that the house should continue in existence than the plaintiff was. Looking at the situation of the parties at that time, it was like a contract to make repairs on the house of another. His

undertaking and duty to go on and finish the work was upon an implied condition that the house, the product of their joint contributions, should remain in existence. The destruction of it by fire discharged him from his contract. * * *

(3) *Impossibility Because of Sickness or Death, in Personal Service Contracts*

The death or incapacitating illness of the promisor in a personal service contract will operate as a discharge on the ground of impossibility, for in such contracts the law reads in an implied condition that the promisor be physically able to perform.

It should be clearly understood that the operation of this exception to the general rule, that impossibility is no excuse for non-performance, is limited to contracts actually involving the personal services of the promisor. The rule that his death discharges his contract does not apply where the services are of such a character that they may just as well be performed by his personal representative. So in the case of a general contractor, obligated to produce a structure according to stated specifications, death of the contractor would not excuse. All that is called for is a stated result; the means by which the result is to be produced lie within the control of the contractor; he may himself do it, or employ others to do it. This is not a personal service contract.

The exception has been extended to circumstances where there is even no sickness and no more than a reasonable danger of sickness. It has been held that where, from the prevalence of a contagious and fatal disease in the vicinity of the place where one has contracted to labor for a specified time, the danger is such as to render it unsafe and unreasonable for men of ordinary care and prudence to remain there, it is a sufficient cause for not fulfilling the contract.¹²

¹² Lakeman v. Pollard, 43 Me. 463, 69 Am.Dec. 77.

(4) *Impossibility Because Conditions Essential to Performance Do Not Exist*

A fourth exception, recognized in the majority of jurisdictions, is that performance of a contract will be excused where conditions essential to performance do not exist.

KINZER CONST. CO. v. STATE.

Court of Claims of New York, 1910. 125 N.Y.S. 46.

RODENBECK, J. The claimant made a contract with the state of New York to construct 3.76 miles of the improved Champlain Canal which is a part of the so-called Barge Canal system of the state now in progress of construction; and while the work was in progress, and claimant was excavating for one of the locks, an extensive cave-in occurred, which revealed the fact that for the balance of the contract the earth was of a "slippery, greasy clay," with not sufficient resistency to permit of the construction according to the contract, plans, and specifications of the lock and substantially the remainder of the work. The state issued a stop order while it was investigating and determining what to do under these unexpected conditions, and this order remained in force for six months, when an alteration order which involved extensive changes in the construction of the remainder of the work was submitted by the state to the claimant for the completion of the contract. The claimant refused to accept these alterations, insisting that they constituted a fundamental change in the contract and amount to a breach of the contract by the state, and thereupon the state proceeded to advertise for bids for the completion of the work, and let it to other contractors, and the claimant filed his claim for the work done and not paid for, and for damages including loss of profits on the portion of the work uncompleted, amounting, in all, to \$370,525.41. The total amount of the contract, including previous alteration orders, was \$968,-296.11, and there was uncompleted at the time that the stop order was issued \$521,954.42, and of this amount \$398,612 was eliminated and new work was added, aggregating \$153,584.50, so that the work to be done there was a reduction of \$245,027.50, or a decrease of about 25 per cent. of the contract price, and upon

these facts, and upon the terms of its contract, the claimant insists that the state violated its contract and justified its course in refusing to complete the contract; while the state claims that the construction of the work when the cave-in occurred revealed the fact that the subsoil was so treacherous that the lock could not be constructed in that section of claimant's contract at all, and made necessary the other changes in the plans and specifications, and also that the alterations were authorized by the contract, and that claimant was guilty of a breach of its contract in refusing to complete it as directed by the alteration order. * * *

When the excavation for the foundation of the lock had been carried to a depth of 10 or 12 feet, it was found that the underlying stratum was a greasy, slippery clay with no grit in it—"just like axle grease"—as one witness put it. Claimant's expert said that he had never seen any soil like it, and that it would not be good engineering to build a lock in such material at all. Under this condition of things, the case falls within that line of decisions where the contract is regarded as at an end and performance is excused because of the failure of conditions the existence of which are necessary to the performance of the contract. The early rule upon impossibility as an excuse for the performance of a contract was that inability to execute an absolute executory contract due to subsequent unforeseen accident or misfortune without the fault of either party will not excuse performance. *Paradine v. Jane, Aleyn*, 26. This rule which was promulgated in English Jurisprudence as early as the year 1178 was based upon the ground as stated in this case that: "Where the party by his own contract creates a duty or charge upon himself, he is bound to make it good, if he may, notwithstanding any accident by inevitable necessity, because he might have provided against it by his contract." * * *

In England the rule prevailed in all its severity down to the middle of the last century (*Hall v. Wright, E. B. & E.* [1857]), but since then the courts both here and in England have modified it to a large extent upon the theory that the event which rendered the performance impossible should be implied as a matter of law as one of the conditions of the contract (*Taylor v. Caldwell*, 3 B. & S. 8249, [1863]; *Bailey v. De Crespigny*, L.R. 4 Q.B. 185), thus carrying out the supposed intention of the parties. * * *

These exceptions have been growing so that now there are at least four well-recognized modifications of the early rule, while the courts seem to be groping for a rule broad enough to include all of the exceptions. Three of these exceptions have long since been firmly established in the jurisprudence, not only of this country, but of England, and the fourth has been adopted in many cases of recent date in this state where the existing rules did not equitably meet the peculiar facts. The rule that performance is excused where legal impossibility arises from a change in the law or where the specific thing which is essential to performance is destroyed, or where there is an incapacity by sickness or death in the case of a contract for personal services, are of long standing, but quite recently a fourth and broader rule has grown up which is applicable to the case at bar. * * *

In *Lorillard v. Clyde*, 142 N.Y. 456, 462, 37 N.E. 489, 491, 24 L.R.A. 113, the defendant was relieved from paying dividends, which he had agreed to do, because the corporation out of whose earnings they were to come had been involuntarily dissolved. Chief Judge Andrews says in his opinion: " * * * The contract in question was not with the corporation whose life was extinguished by the judgment of dissolution. But the guaranty assumed that the corporation would continue in existence during the seven-year period. The liability which the defendants assumed was in consideration of the benefits which might accrue to them from the management of the transportation business of the corporation during that period. Upon the assumption that the death of the corporation was brought about without their fault, were they thereafter bound? Is the doctrine of implied condition less applicable than it would be if the contract had been between the defendants and the corporation? If in the one case the contract, so far as it was unexecuted, would be terminated, did not the happening of the same event terminate the engagement of these parties, based on the assumed continuance of the corporation in life?" * * *

In *Buffalo & Lancaster Land Co. v. Bellevue L. & I. Co.*, 165 N.Y. 247, 254, 59 N.E. 5, 7, 51 L.R.A. 951, the plaintiff failed to secure relief for an alleged breach of a contract for the construction of an electric road under which the defendant had agreed to operate cars certain hours each day, and was prevented from

doing so on certain days in the winter by storms of unusual severity. * * *

In Whipple v. Lyons Beet Sugar Refining Co., 64 Misc. 363, 365, 118 N.Y.S. 338, 340, the impossibility of performance arose from drought and other climatic conditions which prevented the defendant from carrying out a contract to grow a certain number of acres of beets for a sugar company according to certain printed instructions. * * *

From these cases it will be seen that a fourth exception must be made to the general rule that accident or an unforeseen contingency arising without the fault of either party will not excuse performance of an absolute executory contract, and the four exceptions may now be stated broadly as follows: First, where the legal impossibility arises from a change in the law; * * * second, where the specific thing which is essential to the performance of the contract is destroyed; * * * third, where by sickness or death personal services become impossible; * * * and, fourth, where conditions essential to performance do not exist. * * * From these considerations the rule may be deduced fairly in the present case that where in the course of the construction of a canal natural conditions of soil unexpectedly appear which contingency the contract does not in express terms cover, and which render the performance of the contract as planned impossible, and make necessary substantial changes in the nature and cost of the contract and substantially affect the work remaining under the contract, the law will read into the contract an implied condition when it was made that such a contingency will terminate the entire contract. * * *

In the eyes of the law being a part of the terms of the contract, the conditions that rendered performance impossible do not terminate the contract ab initio, and vitiate what has been done and what remains to be done that is capable of execution. The conditions may be of such an extent as to amount to a substantial abrogation of the entire contract, or they may relate to an insignificant part of the contract, but they excuse performance only to the extent to which performance is impossible, and leave what has been done valid, permitting a recovery therefor, and may not excuse performance of the remaining work. No general rule can be laid down which will apply to all cases, but each case must be decided upon its own facts, and that this course can

be taken and justice done according to the facts in each case unhampered by written rules is due to the great flexibility of the common law, which is its chief merit.

Applying this rule to the case at bar, it will be seen to work out an equitable result. The state was not in a position to compel performance of an impossibility, and likewise the claimant could not ask the state to proceed with the contract. It would not have been fair of the state to insist upon the literal performance of its contract, and place the loss upon the claimant for the failure to perform, nor would it have been just for the claimant to insist that the state must carry out its contract as planned or suffer the penalty of paying damages, including prospective profits for the breach of the contract. It is better to regard the contract as at an end, and treat both parties as having been excused from further performance, allowing the claimant to recover for work done and for benefits received by the state under the contract down to the time of the discovery of the conditions which rendered performance impossible, and for such damages as may have resulted to it from the stop order issued by the state.

* * * The state, therefore, had the right to relet the completion of the work, but must bear the increased expense resulting therefrom, while the claimant is not entitled to recover for any prospective profits on the work remaining to be done. * * *

The claimant should have judgment for \$70,679.25, with interest on \$61,144.16 from December 15, 1908.

Judgment entered accordingly.

MINERAL PARK LAND CO. v. HOWARD et al.

Supreme Court of California, 1916. 172 Cal. 289, 156 P. 458, L.R.A.1916F, 1.

[Action by the Mineral Park Land Company against P. A. and C. H. Howard. Judgment for plaintiff, and defendants appeal. Modified and affirmed.]

SLOSS, J. The defendants appeal from a judgment in favor of plaintiff for \$3,650. The appeal is on the judgment roll alone.

The plaintiff was the owner of certain land in the ravine or wash known as the Arroyo Seco, in South Pasadena, Los Angeles county. The defendants had made a contract with the public au-

thorities for the construction of a concrete bridge across the Arroyo Seco. In August, 1911, the parties to this action entered into a written agreement whereby the plaintiff granted to the defendants the right to haul gravel and earth from plaintiff's land, the defendants agreeing to take therefrom all of the gravel and earth necessary in the construction of the fill and cement work on the proposed bridge, the required amount being estimated at approximately 114,000 cubic yards. Defendants agreed to pay 5 cents per cubic yard for the first 80,000 yards, the next 10,000 yards were to be given free of charge, and the balance was to be paid for at the rate of 5 cents per cubic yard.

The complaint was in two counts. The first alleged that the defendants had taken 50,131 cubic yards of earth and gravel, thereby becoming indebted to plaintiff in the sum of \$2,506.55, of which only \$900 had been paid, leaving a balance of \$1,606.55 due. The findings support plaintiff's claim in this regard, and there is no question of the propriety of so much of the judgment as responds to the first count.

The second count sought to recover damages for the defendants' failure to take from plaintiff's land any more than the 50,131 yards. * * *

The court found that the plaintiff's land contained earth and gravel far in excess of 101,000 cubic yards, but that only 50,131 cubic yards, the amount actually taken by the defendants, was above the water level. No greater quantity could have been taken "by ordinary means," or except by the use, at great expense, of a steam dredger, and the earth and gravel so taken could not have been used without first having been dried at great expense and delay. On the issue raised by the plea of defendants that they took all the earth and gravel that was available the court qualified its findings in this way: It found that the defendants did take all of the available earth and gravel from plaintiff's premises, in this, that they took and removed "all that could have been taken advantageously to defendants, or all that was practical to take and remove from a financial standpoint"; that any greater amount could have been taken only at a prohibitive cost, that is, at an expense of 10 or 12 times as much as the usual cost per yard. It is also declared that the word "available" is used in the findings to mean capable of being taken and used advantage-

ously. It was not "advantageous or practical" to have taken more material from plaintiff's land, but it was not impossible. There is a finding that the parties were not under any mutual misunderstanding regarding the amount of available gravel, but that the contract was entered into without any calculation on the part of either of the parties with reference to the amount of available earth and gravel on the premises.

The single question is whether the facts thus found justified the defendants in their failure to take from the plaintiff's land all of the earth and gravel required. This question was answered in the negative by the court below. The case was apparently thought to be governed by the principle—established by a multitude of authorities—that where a party has agreed, without qualification, to perform an act which is not in its nature impossible of performance, he is not excused by difficulty of performance, or by the fact that he becomes unable to perform. 1 Beach on Contracts, § 217.

* * *

It is, however, equally well settled that, where performance depends upon the existence of a given thing, and such existence was assumed as the basis of the agreement, performance is excused to the extent that the thing ceases to exist or turns out to be nonexistent. 1 Beach on Contracts, § 217; 9 Cyc. 631. Thus, where the defendants had agreed to pasture not less than 3,000 cattle on plaintiff's land, paying therefor \$1 for each and every head so pastured, and it developed that the land did not furnish feed for more than 717 head, the number actually put on the land by defendant, it was held that plaintiff could not recover the stipulated sum for the difference between the cattle pastured and the minimum of 3,000 agreed to be pastured. *Williams v. Miller*, 68 Cal. 291, 9 P. 166. Similarly in *Brick Co. v. Pond*, 38 Ohio St. 65, where the plaintiff had leased all the "good No. 1 fire clay on his land," subject to the condition that the lessees should mine or pay for not less than 2,000 tons of clay every year, paying therefor 25 cents per ton, the court held that the lessees were not bound to pay for 2,000 tons per year, unless there was No. 1 clay on the land in such quantities as would justify its being taken out. In *Ridgely v. Conewago Iron Co.*, C.C.Pa., 53 F. 988, the holding was that a mining lease requiring the lessee to mine 4,000 tons of ore annually, and to pay therefor a fixed sum per ton, or, failing to take out such quantity, to pay therefor, imposed no obliga-

tion on the lessee to pay for such stipulated quantity after the ore in the demised premises had become exhausted. There are many other cases dealing with mining leases of this character, and the general course of decision is to the effect that the performance of the obligation to take out a given quantity or to pay royalty thereon, if it be not taken out, is excused if it appears that the land does not contain the stipulated quantity. *Brooks v. Cook*, 135 Ala. 219, 34 So. 960; *Muhlenberg v. Henning*, 116 Pa. 138, 9 A. 144; *McCahan v. Wharton*, 121 Pa. 424, 15 A. 615. * * *

We think the findings of fact make a case falling within the rule of these decisions, the parties were contracting for the right to take earth and gravel to be used in the construction of the bridge. When they stipulated that all of the earth and gravel needed for this purpose should be taken from plaintiff's land, they contemplated and assumed that the land contained the requisite quantity, available for use. The defendants were not binding themselves to take what was not there. And, in determining whether the earth and gravel were "available," we must view the conditions in a practical and reasonable way. Although there was gravel on the land, it was so situated that the defendants could not take it by ordinary means, nor except at a prohibitive cost. To all fair intents then, it was impossible for defendants to take it.

"A thing is impossible in legal contemplation when it is not practicable; and a thing is impracticable when it can only be done at an excessive and unreasonable cost." 1 Beach on Contracts, § 216. We do not mean to intimate that the defendants could excuse themselves by showing the existence of conditions which would make the performance of their obligation more expensive than they had anticipated, or which would entail a loss upon them. But, where the difference in cost is so great as here, and has the effect, as found, of making performance impracticable, the situation is not different from that of a total absence of earth, and gravel. * * *

SECTION 6.—WHEN THERE MAY BE RECOVERY FOR A PART PERFORMANCE

1. IN CONSTRUCTION CONTRACTS

Where a party is so materially in default as to amount to breach of the condition, express or implied, to the other party's liability, he may not recover at all for his part performance, on the contract. He may, however, recover in quasi contract the reasonable value of the benefit conferred on the other party by his part performance, provided.

- (1) The breach was not willful;
- (2) The part performance resulted in actual benefit.

We have already seen that where a contractor is materially in default—that is, where there is less than a substantial performance of the contract—there can be no recovery of the contract price; for the reason that the breach of the condition precedent relieves the other party from his obligations under the contract. However, where the contractor has acted with a bona fide intention of performing the contract, and the owner retained the benefit of the labor and materials expended in the partial performance, the law implies a promise on the owner's part to pay the reasonable value of that benefit; and the contractor may recover in quasi contract or a quantum meruit for the amount of the benefit received less the damages suffered by the owner. Note that the requisite elements of an action quasi contractual are, first, that there is an actual benefit to the owner, and second, that the performance was in good faith, that is, that the breach was not willful.

GILLIS et al. v. COBE et al.

Supreme Judicial Court of Massachusetts, 1901. 177 Mass. 584, 59 N.E. 455.¹³

[Action by Daniel B. Gillis and others against Mark H. Cobe and others. From a judgment in favor of defendants, plaintiffs appeal.]

¹³ Statement of facts is omitted.

LORING, J. [The first question submitted to the court by the referee is whether the plaintiffs' right to recover the contract price for the construction of the building depends upon their securing a certificate from the architect.] * * * Though the provisions of this contract are not as explicit as building contracts usually are in this respect, yet, on a fair construction of its terms, we think that the plaintiffs' right to recover does depend upon their producing a certificate from the architect. In the specifications, which are made part of the contract, there is this provision: "Payments to be made only upon a written order from the architects as the work progresses. No order will be considered an acceptance of the work on which it is given. Only an order for the final payment shall be considered as an acceptance of the work." This clause, taken in connection with the two following clauses of the contract, must be taken to make the payment of the contract price dependent upon the architect's giving his certificate: "Any disagreement between the owners and the contractor upon any matter arising from these specifications or drawings of the work required shall be decided by the engineers and architect, whose decision shall be final and binding on both parties." "All payments shall be made upon the written certificate of the engineers and architects." We are therefore of opinion that this question does arise.

Further, we are of opinion that the act of the defendants in using the building when the plaintiffs stopped working on it was not an acceptance of it. By the express terms of the contract, "only an order for the final payment shall be considered as an acceptance of the work." The building became the defendants' property as it was affixed to their land; when the plaintiffs stopped working on it, and the architect refused to give a certificate that it was constructed in accordance with the requirements of the contract, the defendants were not bound to remove the building, nor were they bound, so long as the building stood on their land, to abstain from using what was their own. The use of the building, therefore, was not an acceptance of it, under the contract. * * * [By reason of this breach of condition precedent, therefore, there can be no recovery under the contract for the contract price.]

The second question is whether a recovery can be had in this case [in quasi contract or quantum meruit] without furnishing the architect's certificate. * * *

The plaintiffs further contend that they are entitled to the fair value of the structure, viewed with reference to the labor and materials which produced it. * * * But one who has done work under a special contract, and resorts to a recovery under the principle of *Hayward v. Leonard*, 7 Pick., Mass., 181, 19 Am. Dec. 268 [quasi contract], recovers on the ground, and only on the ground, that the result of his work is of some benefit to the defendant; he comes into court admitting that he has not done what he agreed to do, and that he cannot hold the defendant on his promise to pay him the contract price; more than that, he admits that the part which he has failed to perform is one that so far goes to the essence of the contract that it is a condition precedent to a recovery by him on the contract; for, if the part which he agreed to perform and did not perform was of slight importance, it is not a condition precedent; he can recover the contract price without performing it, and the only advantage which the defendant can take of it is by way of recoupment, or by a cross-action, in which the burden is on him, the defendant, to prove the damage he has suffered from its nonperformance. The only ground on which a plaintiff who resorts to a recovery under the principle of *Hayward v. Leonard* is entitled to recover anything is that, though so far as his contract rights are concerned, he is entirely out of court, yet it is not fair that the defendant should go out of the transaction as a whole with a profit at his, the plaintiff's expense; and therefore if the structure, which, for the purposes of a recovery on this ground, he necessarily admits does not come up to the contract requirements in essential particulars, is nevertheless a thing of some value, the defendant ought to make him compensation therefor. That such is the ground on which a recovery can be had in such a case was laid down in the original case of *Hayward v. Leonard*, 7 Pick., Mass., 181, 19 Am.Dec. 268, and has been repeated in the subsequent decisions. * * *

It had been held by this court 12 years before *Hayward v. Leonard* was decided that there could be no recovery on the doctrine afterwards stated at length in that case, if the result

of the plaintiff's misdirected work was not a thing of value.
* * *

There are no cases in which the amount of the compensation to which a plaintiff who resorts to a recovery under the principle of *Hayward v. Leonard* is entitled has received deliberate consideration. But if the sole ground of his being entitled to anything is that, were he not paid something, the defendant would profit at his expense, although his claim is without merit so far as rights under the contract are concerned, it is clear that the amount which should be paid the plaintiff is the amount by which, were no payment made, the defendant would profit at his expense; that is to say, the amount which represents the fair market value of the structure which, against the wishes of the defendant, has been put upon his land. * * *

The case at bar, then, is a case where the plaintiffs have not satisfied the architect that they did their work as required by the contract, as by the terms of the contract they had to do before they were entitled to be paid for it, and where it is expressly found by the referee that "there was no fraud or collusion between architect and defendants which caused him to withhold the certificate, and the retention by the architect of the certificate was, if wrong, from error of judgment." And it is a case where the plaintiffs have failed to prove that they have performed their contract in constructing the filling on which the floor rests which has given way, and where, by the finding of the referee, "the damage to the defendants by reason of the sinking of the floor is in excess of the amount of the plaintiffs' claim." * * *

[Therefore, there being no substantial performance of the contract itself, there can be no recovery for the contract price; and, there being no showing that the labor and materials expended by plaintiffs on defendants' building was of actual value or benefit to defendants, it follows that there can be no recovery on a quantum meruit. The judgment of the lower court in favor of defendants must be sustained.]

CARROLL v. BOWERSOCK.

Supreme Court of Kansas, 1917. 100 Kan. 270, 164 P. 143, L.R.A.1917D, 1006.

BURCH, J. The action was one to recover for part performance of a contract to construct a re-enforced concrete floor in a warehouse, which was destroyed by fire before the floor was completed. The plaintiff recovered, and the defendant appeals.
* * *

The court permitted recovery for substantially what the plaintiff had done by way of performance of the contract before the fire.

The contract was to place the floor in a specific warehouse. Destruction of the warehouse without fault of either party put an end to construction of a floor in that warehouse. No warehouse except the one destroyed having been contemplated or contracted about, the defendant could not be charged with delinquency for not building another. To do so would be to charge him with breach of an obligation which he did not assume. If continued existence of the particular warehouse to which the contract related were not taken for granted by both parties, the plaintiff would be bound by his contract and could not recover at all, no concrete floor having been constructed. * * *

If a contractor should engage to furnish all labor and material and build a house, and the house should burn before completion, the loss falls on him. If a contractor should engage to refloor two rooms of a house already in existence, and should complete one room before the house burned, he ought to be paid something. So far the authorities are in substantial agreement.

The principle upon which the contractor may recover in a case of the character last instanced has been variously stated. Sometimes it is said that it was a material and substantive part of the contract on the owner's side that he would have the house in existence as long as might be necessary for the contractor to do the work. This statement of the principle arbitrarily attaches to the contract a warranty which the parties did not put there, and places the owner in default when he has been guilty of no wrong. Impossibility of performance because of destruction of the building was not contemplated by either party. Performance was prevented without fault of either party,

and the true rule is that neither party can be charged with delinquency because the contract cannot be fulfilled. * * *

The contractor cannot give and the owner cannot obtain that which they contracted about. Neither one can complain of the other on that account, and the law must deal with the new situation of the parties created by the fire. The owner cannot be called on to reimburse the contractor merely because the contractor has been to expense in taking steps tending to performance. A contractor may have purchased special material to be used in repairing a house, and may have had much mill-work done upon it. If the material remain in the mill, and the house burn, there can be no recovery. If the milled material be delivered at the house ready for use, and the house burn, there can be no recovery. It takes something more to make the owner liable for what the contractor has done toward performance. The owner must be benefited. He should not be enriched at the expense of the contractor. That would be unjust, and to the extent that the owner has been benefited, the law may properly consider him as resting under a duty to pay. The benefit which the owner has received may or may not be equivalent to the detriment which the contractor has suffered. The only basis on which the law can raise an obligation on the part of the owner is the consideration he has received by way of benefit, advantage, or value to him.

The question whether or not the owner has been benefited frequently presents difficulties. Sometimes the question is answered by the owner's own conduct, as when by taking possession, or by insuring as his own property, or by other act, he evinces a purpose to appropriate the contractor's material and labor. Sometimes the circumstances are such that the owner is precluded from rejecting the fruits of the contractor's efforts if he would, as when one room is finished under a contract to refloor two. * * *

The test of benefit received has been variously stated. Sometimes it is said that benefit accrues whenever the contractor's material and labor, furnished and performed according to the contract, have become attached to the owner's realty. The facts of particular cases suggest different forms of expression. After considering all the authorities cited in the briefs, the court is inclined to approve, for the purposes of this case, the

form adopted by the Supreme Judicial Court of Massachusetts, in the case of *Young v. Chicopee*, 186 Mass. 518, 72 N.E. 63, cited by the plaintiff. The action was one for labor and material furnished to repair a bridge destroyed by fire while the work was proceeding. The contract required at least half of the material to be "upon the job" before work commenced. The contractor complied with this condition, and distributed material "all along the bridge" and on the river bank. A portion of the material thus distributed but not wrought into the structure was destroyed by fire. Liability for work done upon and material wrought into the structure was not disputed, but the contractor sought to make good his entire loss. The court said:

"In whatever way the principle may be stated, it would seem that the liability of the owner in a case like this should be measured by the amount of the contract work done which, at the time of the destruction of the structure, had become so far identified with it as that but for the destruction it would have inured to him as contemplated by the contract." 186 Mass. 520, 72 N.E. 64.

Applying the test stated to the facts of the present controversy, it is clear that the plaintiff should recover for the work done in cutting the old floor away from the wall and in removing such part of the old floor as was necessary. The warehouse was improved to that extent by labor, the benefit of which had inured to the defendant when the fire occurred. If the fire had not occurred, the undesirable floor would have been out of the way, precisely as the contract contemplated. Likewise, the contractor should recover for the completed concrete footings.

The contractor should not recover for material furnished or labor performed in the construction of either column or floor forms. They were temporary devices, employed to give form to the structure which was to be produced. They were not themselves wrought into the warehouse, were to be removed when the work was completed, and inured to nobody's benefit but that of the contractor. The contractor should not recover for either upright or floor rods, or for the labor of putting them in place. While the rods were wired together, they were not attached to the building and would not have been wrought into the structure until the concrete was poured. If the fire had not occurred, the contractor could have removed the rods without dismembering

or defacing the warehouse, and the defendant could not have held the rods as amalgamated into the fabric of his structure. There should be no recovery for superintendance and use of tools, except as regards that part of the work done which had become identified with the warehouse itself. Other items sued for should be allowed or disallowed by application of the principle indicated.

* * *

The defendant says he had a right to a specific kind of completed floor which he could test and which would comply with a prescribed test, and that cutting away the old floor from the walls of the building and concrete footings for a floor which was never laid, were of no value to him. The test is whether or not the work would have inured to his benefit as contemplated by the contract if the fire had not occurred. The cutting away of the old floor was done according to the contract, and the defendant had the benefit of that work as soon as it was finished. The evidence was that putting in the concrete footings was the next step in the construction of the concrete floor. Those footings would have inured to his benefit, in accordance with the contract, if the fire had not occurred. They became a part of his warehouse. Unless he could reject them for want of substantial compliance with the contract so far as they were concerned, he was benefited by them at the time of their incorporation into his structure. Test of a completed concrete floor was one of the things rendered impossible by the fire. * * *

The judgment of the district court is reversed, and the cause is remanded, with direction to take such additional evidence as may be necessary and determine the rights of the parties according to the views which have been expressed.¹⁴

(2) IN PERSONAL SERVICE CONTRACTS

The rule that no recovery is allowed for a part performance where the breach is willful, either in contract since full performance is a condition, nor in quasi contract, is subject to an exception in some

¹⁴ The dissenting opinion of Johnston, J., in which Dawson, J., concurs, is omitted.

jurisdictions in the case of personal service contracts. The weight of authority is to the contrary.

If a man engages a servant for a specified time and agrees to pay him if he works for that time, his rendition of the service is a condition precedent to his right to recover the promised compensation, or any part of it. If he leaves his employer's service before that time, without excuse, before the time is expired, he certainly cannot recover on the contract, for he has not performed it. The only way he can recover in quasi contract, in view of the willful breach, is to make an out and out exception of personal service contracts. A minority of jurisdictions have done so.

BRITTON v. TURNER.

Superior Court of Judicature of New Hampshire, 1834.
6 N.H. 481, 26 Am.Dec. 713.

PARKER, J. It may be assumed that the labor performed by the plaintiff, and for which he seeks to recover a compensation in this action, was commenced under a special contract to labor for the defendant the term of one year, for the sum of one hundred and twenty dollars, and that the plaintiff has labored but a portion of that time, and has voluntarily failed to complete the entire contract.

It is clear, then, that he is not entitled to recover upon the contract itself, because the service, which was to entitle him to the sum agreed upon, has never been performed.

But the question arises, can the plaintiff, under these circumstances, recover a reasonable sum for the service he has actually performed, under the count in quantum meruit. Upon this, and questions of a similar nature, the decisions to be found in the books are not easily reconciled.

It has been held, upon contracts of this kind for labor to be performed at a specified price, that the party who voluntarily fails to fulfill the contract, by performing the whole labor contracted for, is not entitled to recover anything for the labor actually performed. However much * * * this has been considered the settled rule of law upon this subject, * * * [we cannot agree

with this view.] Where * * * a party actually receives labor or materials [under a contract,] and * * * derives a benefit and advantage over and above the damage which has resulted from the breach of the contract by the other party, the labor actually done and the value received furnish a new consideration and the law thereupon raises a promise to pay to the extent of the reasonable worth of such excess. This may be considered as making a new case, one not within the original agreement, and the party is entitled to "recover on his new case, for the work done, not as agreed, but yet accepted by the defendant." * * *

If, on such failure to perform the whole, the nature of the contract be such that the employer can reject what has been done, and refuse to receive any benefit from the part performance, he is entitled so to do, and in such case is not liable to be charged. * * * He has in such case received nothing, and having contracted to receive nothing but the entire matter contracted for, he is not bound to pay, because his express promise was only to pay on receiving the whole, and having actually received nothing, the law cannot and ought not to raise an implied promise to pay. But where the party receives value, takes and uses the materials, or has advantage from the labor, he is liable to pay the reasonable worth of what he has received. * * *

In fact, we think the technical reasoning that the performance of the whole labor is a condition precedent, and the right to recover anything dependent upon it—that the contract being entire there can be no apportionment—and that there being an express contract no other can be implied, even upon the * * * performance of service, is not properly applicable to this species of contract, where a beneficial service has actually been performed. * * *

Where a beneficial service has been performed and received, therefore, under contracts of this kind, the mutual agreements cannot be considered as going to the whole of the consideration, * * * without a specific proviso to that effect. * * * It is easy, if parties so choose, to provide by an express agreement that nothing shall be earned, if the laborer leaves his employer without having performed the whole service contemplated, and then there can be no pretense for a recovery if he voluntarily deserts the service before the expiration of the time.

The amount, however, for which the employer ought to be charged, where the laborer abandons his contract, is only the reasonable worth or the amount of advantage he receives upon the whole transaction, * * * and in estimating the value of the labor, the contract price * * * cannot be exceeded. * * * The benefit * * * which the party takes by the labor, therefore, is the amount of value * * * he receives, if any, after deducting the amount of damage. * * * If in such case it be found that the damages are equal to, or greater than, the amount of the labor performed, so that the employer, having a right to the full performance of the contract, has not upon the whole case received a beneficial service, the plaintiff cannot recover. * * *

[The judgment for the plaintiff will be sustained.]

CHAPTER 8

ASSIGNMENT OF CONTRACTS

Section

1. Assignment of Rights and Benefits.
 2. Assignment of Obligations.
 3. Priorities of Successive Assignees.
 4. Difference between Assignment and Negotiation.
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SECTION 1.—ASSIGNMENT OF RIGHTS AND BENEFITS

A chose in action, or rights under a contract, may be assigned to a third person provided the contract is not for exclusively personal services. But—

- (1) Notice is necessary to bind the debtor or person liable.
- (2) The assignee takes subject to all defenses and set-offs available against the assignor.

It may be said that anything which directly or indirectly involves a right of property is assignable. A right under a contract is a thing of value and in this sense is property.

An assignment is a transfer to another of the rights under a contract, by the party originally entitled thereto. The party making the transfer is called the assignor; the party to whom the transfer is made is called the assignee. The assignment may be of rights or obligations. The question is whether either or both may be assigned without the consent of the other party to the contract. We shall consider the assignment of rights and obligations separately.

Novation.—Where one of the parties to a contract wishes to assign his rights and obligations under it, and the other party consents to this assignment then no difficulty is encountered, for there is here only a substitution of parties by agreement. This substitution of a new obligation for an old one is called a novation. The assignor is released from his obligations by the other party to the contract; the consideration for the release being

the new rights gained against the assignee. But where there is consent to the assignment by the other party to the contract, but no release of the original party, then there is no novation; for the original party yet remains liable.

Example of Novation.—A, a landowner, entered into a contract with B, a builder, by which B agreed to build a house for A according to plans and specifications, and A agreed to pay B \$15,000 therefor. When the house was half finished, A sold his land to C, and assigned to C all his rights in this contract. If B agreed to this assignment, accepting C's promise to pay him for building the house in substitution for A's promise, and if B released A from his promise to pay, this three-party agreement would constitute a novation.

Assignment of Rights Without Consent.—There can be no doubt but that consent is unnecessary in the assignment of absolute rights. Thus, where A has a sum of money due him from his employer for past services rendered, clearly he may assign his right to collect this money. The right is not conditioned upon his performing services in the future, but is absolute, or "executed." It is where conditional rights are attempted to be assigned—that is, where the contract is executory—that difficulties as to assignment arise. The general rule is, however, that an executory contract which does not involve personal confidence can be assigned by one of the parties without the consent of the other party to the contract, unless there is some provision in the contract to the contrary.

MALLIN v. WENHAM et al.

Supreme Court of Illinois, 1904.
209 Ill. 252, 70 N.E. 564, 65 L.R.A. 602, 101 Am.St.Rep. 233.

[The plaintiff, Mallin, had been employed for several years prior to this suit by Armour & Co. on a salary of \$100 per month. He had no definite contract of employment, but was employed from month to month. He borrowed money from Wenham, defendant herein, and executed to Wenham an assignment of his wages to be earned in the future. Subsequently Wenham claimed Mallin's wages due from Armour & Co., and Mallin filed this, without offering to pay Wenham the \$300 he owed him, and prayed

that his assignment of wages be declared null and void, on the ground that at the time the assignment was made he had no right against Armour & Co. which was capable of assignment, and that Wenham be restrained from interfering with Mallin's salary. The question is whether an assignment transferring wages to be earned in the future under an existing employment is valid.]

RICKS, J. In respect to the first proposition mentioned, the authorities are ample and conclusive to the effect that an assignment of wages to be earned in the future, under an existing employment, is valid. This precise question has frequently been passed upon by the courts of the different states and of England, and, so far as we are advised, the courts of *dernier ressort* have, without exception, upheld such contracts, where they have been for a valuable consideration and untainted with fraud. The authorities are to the effect that it is not necessary that there be an express hiring for a definite time, but the existence of the employment at the time of the assignment is sufficient. In the case at bar appellant was, and had been for some time previous, in the actual employ of Armour & Co. at a fixed price per month. It is true, such employment was not of any definite duration, and appellant might abandon the same at any time, or his employer might discharge him. The subject-matter of the contract had but a potential existence, but it was such a property right as might legally be disposed of.

The remarks of the court in *Thayer v. Kelley*, 28 Vt. 19, 65 Am. Dec. 220, are very pertinent to the subject in hand, and we here quote them: "When the debtor is in the actual employment of another, and is receiving wages under a subsisting engagement, an assignment by him of his future earnings may be made, not only for the security and payment of a present indebtedness, but for such advances as he may find it necessary to obtain. This principle is fully established by the cases to which we were referred. *Weed v. Jewett*, 2 Metc., Mass., 608, 37 Am.Dec. 115; *Brackett v. Blake*, 7 Metc., Mass., 335, 41 Am.Dec. 442; *Field v. Mayor of New York*, 6 N.Y. 187, 57 Am.Dec. 435; *Emery v. Lawrence*, 8 Cush., Mass., 151. The debtor in this case, at the time of his assignment to the claimants, was in the actual employment of the trustees under a subsisting contract, at a given price per day, and had in that manner labored for them for some two or three years previous; and though he had the right to leave

their employment and they had the right to discharge him, yet so long as that relation existed between them we think the authorities are satisfactory in holding that the claimants were entitled to receive, under that assignment, his accruing wages in payment of the advances which they had made." * * *

MUELLER v. NORTHWESTERN UNIVERSITY.

Supreme Court of Illinois, 1902. 195 Ill. 236, 63 N.E. 110, 88 Am.St.Rep. 194.

[Northwestern University entered into a contract with one Fred H. Sammis for the construction of the marble mosaic and tile work in the Illinois Trust & Savings Bank, a building constructed by said University in the city of Chicago, at an agreed price of \$27,344. A term of this contract provided "that the contractor shall not sell, assign, transfer, or set over this contract, or any part thereof or interest therein, unto any person whatsoever, without the consent of the architects, and any such assignment shall be absolutely null and void." After Sammis had performed nearly all of the work, he assigned the balance of \$11,000 due from the University on the contract to Mueller. Mueller notified the University of the assignment. Disregarding the assignment and the notice thereof, the University paid over the balance of the money due to Sammis. Mueller is now suing for this amount.]

HAND, J. It is first contended, the assignment to Mueller being in express violation of the terms of the contract, as against the University the assignment is void, and that Mueller is entitled to no relief by virtue of said assignment, as against the University, even in a court of equity. The contract between the University and Sammis in express terms provides that the contractor shall not sell, assign, transfer, or set over said contract, or any part thereof or interest therein, unto any person or persons whomsoever, without the consent in writing of the architects previously had and obtained thereto, and that an assignment or transfer of the contract without the written consent of the architects first had and obtained thereto shall be absolutely null and void; and no claim is made that the architects or the University consented in writing to the assignment made by Sammis to Mueller. The as-

signment relied upon not having been assented to in writing by the architects or the University, is such assignment null and void as to the University? The rule is laid down in 2 Am. & Eng. Enc. Law, 2d Ed., p. 1035, that the parties to a contract may in terms prohibit its assignment, so that an assignee cannot succeed to any rights in the contract by virtue of the assignment thereof to him, and the rule thus announced is well supported by the authorities.

[The court concluded that, since the contract by its express terms excluded an assignment without consent, the assignment to Mueller was void, and the payment by the University to Sammis discharged its liability.]

SECTION 2.—ASSIGNMENT OF OBLIGATIONS

Although a person may assign his rights under a contract, an attempted assignment both of rights and obligations under contracts (1) involving exclusively personal service, and (2) in which personal trust and confidence are involved, are void unless consent of the other party to the contract is obtained.

SLOAN v. WILLIAMS et al.

Supreme Court of Illinois, 1891. 138 Ill. 43, 27 N.E. 531, 12 L.R.A. 496.

MAGRUDER, J. [This is a bill filed by complainant, Sloan, against one John Williams for the specific performance of a contract to sell land.] On March 11, 1885, a written contract was entered into between George A. Du Puy, an attorney at law, and the said John Williams, by the terms of which Du Puy agreed to take all such steps as might be necessary to perfect the title of Williams to certain lots in Ravenswood, in Cook county, by filing bills to remove clouds, procuring releases, holding possession by repairing fences and posting sale-boards, etc., and to do all the work incident to carrying out the contract, and that he should not receive any remuneration of any sort except that he should have the option to buy or sell said lots as therein set forth, and should not be required to furnish any money; and

Williams agreed to furnish money to discharge liens, redeem from tax-sales, pay trustee's charges, and costs necessary to set aside tax-titles; and that Du Puy, in consideration of the services to be rendered by him should have the sole privilege of purchasing any one or more of said lots, or of effecting a sale of any one or more of them to such party as he might desire, at the price of \$500 each, for the space of 18 months from the time when everything necessary to make the title perfect in Williams shall have finally been done, said price to be paid in cash, or one-quarter thereof in cash and the balance in three years, and to be secured by mortgage on the premises, or "said sale may be upon any other terms which said John Williams may deem satisfactory to himself." The contract also contains provisions that Williams will pay all taxes and special assessments due when the sale is made, and will furnish to the purchaser an abstract of title, and will convey said lot or lots by deed covenanting against his own acts, and containing "usual release of all right of dower and homestead which any person may have in any one or more of said lots so sold."

The bill sets forth the contract in full, and alleges that on December 23, 1886, Du Puy, for value received, duly assigned in writing to the complainant Sloan, all his right, title, and interest in said contract, and rights and benefits thereunder, and that, by virtue of such assignment, all the rights and interests of Du Puy accrued to the complainant. The bill further avers that Williams was bound, under the agreement and the assignment thereof, on the payment or tender to him of \$500, to convey to complainant, by deed "which should contain the usual release of all right of dower and homestead which any person might have in or to said lot;" that, at different times in the spring and summer of 1887, complainant tendered to Williams, in his own name and in that of Du Puy, said sum of \$500, and demanded that he furnish an abstract of title, "and also that he so deliver to your orator such a deed, as above specified." The bill also offers to bring the \$500 into court in payment for "the said conveyance, as aforesaid."

The main ground of objection to the bill is that the contract which it seeks to enforce is one which calls for the personal services and skill of one of the parties thereto, and therefore is not assignable. We think that this objection is well taken, and that

the demurrer to the bill was properly sustained. Du Puy was a lawyer by profession, and, by the terms of the contract, was required to make use of his professional skill in perfecting the title to the lots by instituting and carrying on legal proceedings to remove clouds, by procuring releases, and by the use of other methods. The contract itself upon its face does not provide for any assignment of it. It is well settled that "contracts in which the personal acts and qualities of one of the contracting parties form a material ingredient are, in general, not assignable." 2 Chit.Cont., 11th Amer.Ed., p. 1363. Engagements for personal services requiring skill, science, or peculiar qualifications may not be assigned. Devlin v. Mayor, 63 N.Y. 8. A party who thus agrees to use his personal skill and knowledge, and has been contracted with by reason of the trust and confidence placed in him personally, cannot, while the agreement is still executory, substitute another in his place by assignment, in order to perform the service, without the consent of the other contracting party. * * *

DEMAREST v. DUNTON LUMBER CO.

Circuit Court of Appeals of the United States, Second Circuit, 1908. 161 F. 264.

WARD, Circuit Judge. The plaintiff sues as assignee of a contract dated December 11, 1900, between W. E. Kelly & Co. and the Dunton Lumber Company, and complains that the defendant has failed and refused to deliver to him lumber covered by the contract. Under the contract the lumber company sold to Kelly & Co. the entire cut of white pine lumber for 1901, except so much as it should need for its retail trade in the city of Rumford Falls, agreeing to retain, not the best of the lumber, but only an average grade for that trade. Delivery was to be f. o. b. cars at Rumford Falls, Kelly & Co. to pay within 10 days from date of invoice. The logs were to be cut in lengths of 12, 14, and 16 feet; but Kelly & Co. agreed to accept some lumber shorter than 12 feet, not less than 8 feet, and some longer than 16 feet. The trial judge held that this contract was not assignable, and that, therefore, the plaintiff had no right of action.

While the authorities do not differ as to the principle that a contract personal in its nature cannot be assigned by one party

without the consent of the other, they differ in the application of the principle; the question in each case being whether the contract is personal or not. The law on the subject for the federal courts has been laid down by the Supreme Court in Arkansas Smelting Company v. Belding Mining Company, 127 U.S. 379, 387, 8 S.Ct. 1308, 32 L.Ed. 246, in which Mr. Justice Gray said:

"At the present day, no doubt, an agreement to pay money, or to deliver goods, may be assigned by the person to whom the money is paid or the goods are to be delivered, if there is nothing in the terms of the contract, whether by requiring something to be afterwards done by him, or by some other stipulation, which manifests the intention of the parties that it shall not be assignable. But every one has a right to select and determine with whom he will contract, and cannot have another person thrust upon him without his consent. In the familiar phrase of Lord Denman: 'You have the right to the benefit you anticipate from the character, credit, and substance of the party with whom you contract.' Humble v. Hunter, 12 Q.B. 310, 317; Winchester v. Howard, 97 Mass. 303, 305, 93 Am.Dec. 93; Boston Ice Co. v. Potter, 123 Mass. 28, 25 Am.Rep. 9; King v. Batterson, 13 R.I. 117, 120, 43 Am.Rep. 13; Lansden v. McCarthy, 45 Mo. 106. The rule upon this subject as applicable to the case at bar, is well expressed in a recent English treatise: 'Rights arising out of contract cannot be transferred, if they are coupled with liabilities, or if they involve a relation of personal confidence such that the party whose agreement conferred those rights must have intended them to be exercised only by him in whom he actually confided.' Pollock on Contracts, 425."

The contract under consideration is not merely for the sale of personal property for cash, but implies confidence in Kelly & Co., because they were to have 10 days' credit after title to the lumber passed to them, and because the amount of lumber shorter or longer than the lengths provided for in the contract which they were to accept was not fixed. So, also, the amount of lumber the lumber company needed for its retail trade was not fixed, and that amount, as well as the grade of lumber retained, were subjects which the lumber company might have been willing to leave open with Kelly & Co., but not with their assigns. The rights of Kelly & Co. were coupled with liabilities and involved

personal confidence. See, also, *Snow v. Nelson*, C.C.Nev., 113 F. 353. * * *

MACDONALD et al. v. O'SHEA et al.

Supreme Court of Washington, 1910.
58 Wash. 169, 108 P. 436, Ann.Cas.1912A, 417.

[This was a suit by certain mechanic's lienors and materialmen against the National Surety Company for certain unpaid claims and liens incurred in the construction of a building. It appears from the evidence that one John J. Walsh entered into a contract with the Standard Furniture House for the construction of a warehouse. By the terms of the building contract Walsh was to furnish all material and labor for the erection and completion of the said building according to plans and specifications, and was to protect the property from all liens. The National Surety Company executed a surety bond for the faithful performance of this building contract. Walsh died when the building was only partially completed. It is maintained by the defendant surety company that this contract was personal in its nature, involving personal trust and confidence in Walsh as builder, and that therefore the contract was one not capable of assignment; further, that the contract being personal to Walsh its obligations did not survive his death, and that therefore the surety company was no longer liable.]

PARKER, J. * * * Learned counsel for appellants contend that the contract for the construction of the building constituted such a personal relation between Walsh and the Standard Furniture House that his obligation under the contract to construct the building did not survive, but died with him, and that there was no obligation cast upon his personal representative, or his estate, requiring the completion of the building; and hence the surety company was under no obligation to pay lien claims accruing after the death of Walsh in the construction of the building. The general rule governing the survival of contractual obligations as against the personal representative and the estates of deceased persons is stated in 2 Parsons on Contracts, 9th Ed., 685, as follows: "It is a presumption of law that parties to a simple contract intended to bind not only themselves, but their personal representatives; and such parties may sue on a contract, al-

though not named therein. Hence, as we have seen, executors, though not named in a contract, are liable, so far as they have assets, for the breach of a contract which was broken in the lifetime of their testator. And, if the contract was not broken in his lifetime, they must not break it, but will be held to its performance, unless this presumption is overcome by the nature of the contract, as where the thing to be done required the personal skill of the testator himself." 18 Cyc. 239. This rule is elementary. The difficulty in applying it arises when the facts of the particular case are such as to render it doubtful as to whether or not the thing to be done requires the personal skill of the deceased himself. * * *

It is clear that the obligation of deceased under this building contract was that of an independent contractor, and was not a matter of rendering personal service. 16 Am. & Eng. Enc. of Law, 2d Ed., 187. There was nothing in the contractual relation existing between the deceased and the Standard Furniture House at all approaching the relation of master and servant; nor was it contemplated that the building or any part thereof when completed should be the product of his own personal labor or skill, either as laborer, mechanic, or artist. He no doubt expected to perform his contract through the labor and skill of others to a very large extent, and he had the right to so perform the whole of his contract if he so desired. We have not had our attention called to any authorities holding that the obligation of an independent contractor under an agreement to build a building does not survive him, if the contract is not performed at the time of his death, while there is eminent authority to the contrary. * * *

We are of the opinion that the obligations of John J. Walsh under this contract survived him and were binding upon his estate. It follows that the surety company was as much bound to the performance of this contract after the death of Walsh as it would have been had he lived to perform the contract in person. * * *

SECTION 3.—PRIORITIES OF SUCCESSIVE ASSIGNEES

There are two rules determining priority between successive assignees of the same debt or contract right. By the majority rule, the first to give notice to the debtor prevails. By the minority rule, the first assignee in point of time prevails.

By the strict rule of assignment, that the assignee receives only such interest as the assignor has, it is obvious that if the debt has previously been assigned to some one else, the assignor had nothing to convey, so the second assignee gets nothing. This is consonant with the rules prevailing as to the transfer of property in general, and it is difficult to see why any different rule should be applied to intangible property rights than is applied to tangible property. In Massachusetts, Kentucky, Minnesota, New York, West Virginia, and in the Supreme Court of the United States the rule has been adopted that the first assignee in point of time prevails.

The English rule, that assignees have priority according to priority of notice, is followed in this country by the courts of California, Connecticut, Maryland, Mississippi, Missouri, New Jersey, Oklahoma, Pennsylvania, Tennessee, Vermont, and Virginia. The theory is that the first assignee, by his failure to give immediate notice to the debtor, has made it easier for the assignor to defraud a subsequent assignee, since such later assignee may only discover whether the claim is still owing by inquiring of the debtor. Had the first assignee given notice to the debtor, the assignor could not have defrauded the second assignee.

**SECTION 4.—DIFFERENCE BETWEEN ASSIGNMENT
AND NEGOTIATION**

An assignee gets only the rights of his assignor. But one who takes a particular kind of contract right called a "negotiable instrument" may take better rights than his assignor had.

It remains to mention a class of promises the benefit of which is transferable in such a way that the transferee takes without risk of being met by many of the defenses which would have prevailed against his transferor. These contracts are called "negotiable" instruments, for the reason that they may be transferred by "negotiation" as distinguished from assignment. The rules regarding these instruments are discussed in detail later in this book. It should be noted here that the particular requisite necessary to change transfer of such instruments from assignment to a negotiation is indorsement.

GOSHEN NAT. BANK v. BINGHAM et al.

BINGHAM et al. v. GOSHEN NAT. BANK.

Court of Appeals of New York, 1890.
118 N.Y. 349, 23 N.E. 180, 7 L.R.A. 595, 16 Am.St.Rep. 765.

[This is a suit by Bingham, the purchaser of a negotiable bill of exchange or check, against the Goshen National Bank, the drawer of the said check. It appears that one B. D. Brown by fraudulent representations induced the cashier of the Goshen Bank to issue to him as payee the check of the bank for \$17,000. Brown later sold this check to Bingham but through an oversight Brown failed to indorse his name on the back of the check. After procuring the check to be cashed by Bingham, Brown fled to Canada. The Goshen Bank stopped payment on the check, and Bingham is suing the bank on the instrument.]

PARKER, J. As against Brown, to whose order the check was payable, the bank had a good defense. But it could not defeat a recovery by a bona fide holder, to whom the check had been indorsed for value. By an oversight on the part of both Brown and Bingham & Co., the check was accepted and cashed without the indorsement of the payee. Before the authority to indorse the name of the payee upon the check was procured, and its subsequent indorsement thereon, Bingham & Co. had notice of the fraud, which constituted a defense for the Bank as against Brown. Can the recovery had be sustained? It is too well settled by authority both in England and in this country, to permit of questioning, that the purchaser of a draft or check who obtains title without an indorsement by the payee holds it subject

to all equities and defenses existing between the original parties, even though he has paid full consideration, without notice of the existence of such equities and defenses. * * *

The reasoning on which this doctrine is founded may be briefly stated as follows: The general rule is that no one can transfer a better title than he possesses. An exception arises out of the rule of the law-merchant as to negotiable instruments. It is founded on the commercial policy of sustaining the credit of commercial paper. Being treated as currency in commercial transactions, such instruments are subject to the same rule as money. If transferred by indorsement, for value, in good faith and before maturity, they become available in the hands of the holder, notwithstanding the existence of equities and defenses which would have rendered them unavailable in the hands of a prior holder. This rule is only applicable to negotiable instruments which are negotiable according to the law-merchant. When, as in this case, such an instrument is transferred, but without an indorsement, it is treated as a chose in action assigned to the purchaser. The assignee acquires all the title of the assignor, and may maintain an action thereon in his own name; and, like other choses in action, it is subject to all the equities and defenses existing in favor of the maker or acceptor against the previous holder. Prior to the indorsement of this check, therefore, Bingham & Co. were subject to the defense existing in favor of the bank as against Brown, the payee. Evidence of an intention on the part of the transferee to indorse does not aid the plaintiff. It is the act of indorsement, not the intention, which negotiates the instrument; and it cannot be said that the intent constitutes the act. * * * 1

¹ The assignee of a debt gets the same rights against the debtor as the assignor had. If the debtor had defenses to the payment of the debt, they will be as available to him in a suit by an assignee as they would have been in a suit by the assignor. This is but the carrying out of the rule that the buyer of personal property gets whatever rights therein the seller had, and no more; that the innocent purchaser from a thief gets no title to the property sold, for the

thief had no title. But the case of negotiable instruments and money presents the exception to this rule; for the holder in due course of a negotiable instrument takes the same free from defenses of the maker. In the above case it will be observed that Bingham took the instrument as assignee, and not as holder, for the indorsement was lacking, and that therefore he was not in the favored position of a holder in due course.

AGENCY

Chapter

1. Liability of Principal to Third Parties.
 2. Liability of Agent to Third Party.
 3. Liability of Agent to Principal.
 4. Liability of Principal to Agent.
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CHAPTER 1

LIABILITY OF PRINCIPAL TO THIRD PARTIES

Section

1. Liability in Contract—Scope of Agent's Authority.
 2. Principal's Liability in Contract—Doctrine of Undisclosed Principal.
 3. Principal's Liability in Contract—Doctrine of Ratification.
 4. Principal's Liability in Tort—Scope of Employment.
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SECTION 1.—LIABILITY IN CONTRACT—SCOPE OF AGENT'S AUTHORITY

A principal is liable on the contracts made on his behalf by his agent, provided the agent was acting within the scope of his authority, express, implied, or apparent.

Express authority is authority to do that which the principal has expressly told the agent to do.

Implied authority is authority to do all things incidental to the express authorization, or which usually accompany it, or which are reasonably necessary to accomplish it. Implied authority, like express authority is actual authority.

Apparent authority is authority to do those acts which the agent would have had implied power to do were it not for express instructions from his principal to the contrary, the third party being ignorant of these secret instructions.

The principal is liable for the contractual acts of his agent provided the agent acted within the real or apparent scope of

his authority. This is the fundamental rule governing the rights of third persons who have contracted with a principal through an agent. It is to be noted that the principal is not liable for all contracts entered into in his name by his agent, but only for those which lie within the agent's real or apparent powers. The problem, then, is to discover the meaning and extent of the agent's real and apparent authority.

Real Powers of the Agent.—The real power or authority of the agent comprises both the express and implied powers delegated by the principal. The express powers are those contained within the actual instructions of the principal. For example, if the stockholders of a corporation instruct the president to enter into a contract for the purchase of a railroad, the extent of his express power in this regard is precisely the limit of the instruction.

In addition to the express authority, the agent also has implied power to do all things reasonably necessary to carry the express instruction into effect. So an engineer, told to construct a bridge at a certain place, besides the express authority to build the bridge, would have the implied power to bind his principal on all contracts necessary to the completion of the said bridge—power to hire labor, buy materials, contract for transportation, etc.

Authority may be implied from the fact that the principal sent the agent into a locality where by custom or usage the act authorized is usually performed in a certain way. So authority to sell goods carries no implied authority to warrant their quality, for that is not incidental nor does it usually accompany sales. But if the selling agent is sent to a market where by custom warranties normally accompany sales of such goods, the principal with knowledge of the custom of so sending the agent, may be presumed to have intended granting the authority. If he has expressly told the agent *not* to warrant, and the agent violates the instruction, the agent yet has the *apparent* authority and the principal is liable on the warranty, to any third person ignorant of the instruction.

Apparent Powers of the Agent.—The apparent powers of the agent, so called, lie outside the scope of his real authority, express or implied. The agent has in fact exceeded his actual power, and the principal would not be liable if it were not for the

existence of this doctrine which protects a third person who under the circumstances was justified in believing that the agent had the power to do the act. The test of apparent authority is: In any case where the agent would have the actual implied authority to do a particular act, were it not for the express instructions of the principal to the contrary, as to third persons ignorant of such limitation, the agent has the apparent authority to do that act. Thus, if a general manager of a grocery store is told by his principal not to order a certain commodity, normally sold in grocery stores, a contract relating to such commodity made by an innocent third party with the general manager is binding on the principal.

The cases which follow illustrate circumstances in which the courts have held the principal liable or not according to whether the agent's act was or was not within the scope of his real or apparent authority.

HARRIGAN & REID CO. v. HUDSON et al.

Supreme Court of Michigan, 1939. 291 Mich. 478, 289 N.W. 222

McALLISTER, J. Plaintiff, a corporation engaged in the plumbing and heating business, sued defendants, husband and wife, for balance claimed to be due for services and materials furnished in the construction of a house. On trial before a jury, it received a verdict for \$1,009. On motion, the trial court entered a judgment non obstante veredicto in favor of defendants, and plaintiff appeals.

In August, 1936, defendant owners, planning the building of a home, employed Keyes as architect. The terms of such employment are in writing and provided that Keyes was to perform the following services:

1. Proceed with the completion of the working drawings for a residence.
2. Obtain bids.
3. Draw up contracts.
4. Supervise the entire work, including all necessary full-size drawings.
5. In general, render complete architectural services.

The above constituted the only agreement of any nature between Keyes and the defendants.

About the first part of January, 1937, Edward M. Harrigan, president of the plaintiff company, heard that defendants were planning to build a home and, after calling upon Keyes, the architect, examining the specifications for the house, and discussing the matter with him, sent a letter to Keyes, stating that the plaintiff company was pleased "to make the following estimate for furnishing labor and material necessary to install plumbing, heating, and ventilating and cooling apparatus" for the sum of \$38,126. Later, on February 3d, plaintiff sent another estimate to Keyes with regard to certain deductions and additions to the specifications, as a result of bulletins sent out by Keyes. In this further estimate, plaintiff concluded with the statement that there were certain items necessary to check "before giving you an absolute price."

On February 1, 1937, Talbot & Meier, Inc., general contractors, started work on the residence, and on February 3d plaintiff began preliminary work pursuant to a verbal order. Up to this time, it appears that there was no written contract with the general contractor and no written contracts between plaintiff and defendants, or the architect.

On February 10th, however, a contract was signed and executed between the general contractor and defendants.

When Harrigan first met the architect, he examined certain of the specifications for mechanical trades. These specifications referred to the specifications for the architectural trades, providing that the specifications should be subject to the requirements of the standard form and general conditions of the "Contract for the Construction of Buildings, Fourth Edition, copyrighted, 1925, by the American Institute of Architects." Such general conditions provided that the contractor should furnish all of the materials and perform all of the work described in the specifications; that the owner would pay the contractor for the architectural trades, plumbing, heating, ventilating, and electrical wiring; that nothing contained in the contract should create any contractual relation between any subcontractor and owner; that subcontractors agreed to be bound to the contractor by the terms of the agreement, and to assume all obligations that he assumed toward

the owner. It also provided that "nothing in this article shall create any obligation on the part of the owner to pay to, or see to the payment of any sums to any contractor." The specifications further provided that all contracts made by the contractors would be covered by the terms and conditions of the general contract, and that the general contractor would assume full responsibility for the proper execution of the entire work required to make a complete job. Harrigan testified that his bid was submitted in accordance with the "general conditions" of such contract.

Although mention is made therein of a general contractor, Harrigan claims that he did not concern himself about such provision; and stated that, when the estimates, referred to by him as "bids," were submitted, he did not know who the general contractor was to be, and had no means of knowing that the work was to be done under a general contract. * * *

A month after Harrigan found out that Talbot & Meier, Inc., was general contractor, he received an order, addressed to plaintiff company, directing delivery of material to the defendant's premises with directions requiring the work to be done in such a manner that it would avoid delay and setting forth the agreed price of the plumbing and heating at the sum of \$28,217. This order was signed: "Talbot & Meier, Inc., Purchaser."

On receipt of this order, Harrigan went to see the general contractor and called attention to the fact that the sum set forth as the agreed price in the order was less than the revised estimate furnished by him to the architect.

What actually happened was that subsequent to receiving revised estimates from Harrigan, the architect did not change the specifications sufficiently to correspond with plaintiff's reduced bid, and that when plaintiff commenced the work, its bid on such reduced specifications was made the contract price, although the specifications required more materials and service than were comprised in plaintiff's altered estimate. The terms of the general contract included the reduced price of plaintiff's bid, but not the reduced amount of materials and service. * * *

Plaintiff contends that defendants owe the balance claimed, for the reason that the architect, Keyes, was the agent of the defendants; that he had authority to contract for defendants; and that

he entered into an agreement to pay plaintiff the amount claimed. Plaintiff further claims that defendants ratified the agreement by acceptance of the house when completed.

There is no evidence that Keyes was an agent for defendants with authority to enter into a contract on their behalf with plaintiff. He was an architect; and the terms of his employment by defendants were explicitly stated to be for the purpose of obtaining bids, drawing up contracts, supervising the work, and rendering general architectural service. By none of these terms would he have any authority to bind defendants to a contract to pay plaintiff any sum whatever. Authority of one person to contract for another cannot be proved by admissions or statements of the alleged agent whose authority must be determined from or by acts of his principal and not by his representations or doings. *Ward v. Dunnebecke*, 184 Mich. 703, 151 N.W. 630.

There was never any expressed or implied contract between plaintiff and defendants. When plaintiff started work on the project, he had not at that time even agreed with the architect as to the final figures of the work to be done by plaintiff company.

When Harrigan first met Keyes and saw the specifications, he knew, or should have known, that the house was to be erected under a general contract and that the owner assumed no liability for any claims of subcontractors. These provisions were all in the specifications and the form contract, to which the specifications referred. If Harrigan read the specifications, he saw that they referred to a general contract, and that the terms in such form contract controlled the specifications. The contention of plaintiff's counsel that Harrigan was contracting directly with the owner, or his agent, is untenable. * * *

Defendants never saw or spoke to Harrigan, or any representative of the plaintiff company. They had a contract with the general contractor to build the house for a certain amount; they paid this amount on completion of the house according to contract price and specifications. There was no agency on the part of the architect to bind them; their only agreement was that set forth in the general contract. Their acceptance of the house from the general contractor in accordance with the terms of such contract is no ratification of any unauthorized acts of the architect. * * *

[Affirmed.]

HODGES v. BANKERS' SURETY CO.

Appellate Court of Illinois, 1910. 152 Ill.App. 372.

Mr. Justice SMITH delivered the opinion of the court.

The suit is in assumpsit for the recovery of damages growing out of an alleged agreement of [the Bankers' Surety Company], appellee to pay [Hodges] the plaintiff, appellant, whatever the cost * * * of furnishing materials and performing work and labor relative to the mason, concrete and carpenter work on the Eugene Dietzgen factory building at Sheffield and Fullerton avenues, Chicago, exceeded the amount payable to the Federal Concrete Steel Company hereafter called the Federal Company for convenience. Appellant Hodges was a general contractor for the construction of the building, and had sublet the mason, concrete and carpenter work to the Federal Company. The appellee [Bankers' Surety Company] had given its bond to appellant [Hodges] guaranteeing the faithful performance of the contract by the Federal Company. [The Federal Company failed to perform its contract with Hodges, wherefore this suit was filed against the surety. It appeared from the evidence that the plaintiff, Hodges, had entered into a contract to build a factory for the Eugene Dietzgen Company for the certain consideration of forty-seven thousand, five hundred dollars (\$47,500); that plaintiff sublet a contract for a part of the construction to the Federal Concrete Steel Company for a consideration of thirty-three thousand dollars (\$33,000); that plaintiff entered into an agreement with the Bankers' Surety Company whereby the latter had given its bond for fifteen thousand dollars (\$15,000) for the faithful performance by the said Federal Concrete Company of its part of the contract with Hodges, and that the said Federal Concrete Company was in default in the performance of said work, and that thereupon the Bankers' Surety Company, through its agent, George K. Thomas, authorized and directed the plaintiff to proceed and complete the work of the Federal Company, and agreed to pay the said plaintiff whatever amount the cost of completing the work exceeded the \$33,000 which was to have been paid to the said Federal Company; that the amount of this excess was more than the amount of the bond upon which the Bankers' Surety Company was obligated to the plaintiff. The suit is for the amount of the \$15,000 bond. The defendant denies

liability on this bond on the ground that its agent, George K. Thomas, in entering into the contract acted outside the scope of his powers as agent, and that therefore defendant as principal is not liable for his act.]

The evidence for the plaintiff * * * showed that when the bond * * * was issued it had upon it a rubber stamp mark, reading "George K. Thomas, Manager, 604 Chamber of Commerce, * * * Chicago," and that the bonds issued by the defendant were issued and delivered through Thomas as its manager and he collected the premiums or charges therefor. [Also that Thomas corresponded regularly with the defendant upon letter heads of the Bankers' Surety Company, Cleveland, Ohio, which bore Thomas' name as "Manager for Illinois"; and that upon the door of Thomas' office in the Chamber of Commerce building appeared the name of the Bankers' Surety Company, "George K. Thomas, Manager for Illinois." It appeared also from the plaintiff's evidence that the officers of the Bankers' Surety Company of Cleveland often visited Thomas' office.]

The trial court excluded all the evidence, including the offer of proof, upon the ground that no authority was shown to Thomas to make the agreement alleged in the first count of the amended declaration, and instructed the jury to find for the defendant. * * *

The evidence offered by the plaintiff tends to show, in our opinion, that the defendant company is a foreign corporation with its principal office at Cleveland, Ohio; and that it held out Thomas as the manager of its business for the State of Illinois. In Mechem on Agency, paragraph 395, the learned author says: "In general terms it may be said that such an agent has implied powers to do those things which are necessary and proper to be done in carrying out the business in its usual and accustomed way, and which the principal could and would usually do in like cases if present;" and cites German Fire Ins. Co. of Peoria v. Grunert, 112 Ill. 68, 1 N.E. 113. The same author says in paragraph 283 of the work: "The question of the authority of the agent must depend, so far as it involves the rights of innocent third persons who have relied thereon, upon the character bestowed and not upon the instructions given. Or, in other words, the principal is bound to third persons who have relied thereon in

good faith and in ignorance of any limitations or restrictions, by the apparent authority he has given to the agent, and not by the actual or express authority where that differs from the apparent, and this too, whether the agency be a general or a special one."

The evidence presented tended to prove the apparent authority of Thomas to make the agreement set out in the declaration, and that the plaintiff relied upon such authority and the character of the agency bestowed. * * *

In *Phenix Ins. Co. v. Stocks*, 149 Ill. 319, 36 N.E. 408, the court in answering the objection that the agent upon whom a demand was made to submit the question of extent of the loss to arbitration in compliance with a provision of the policy in that regard, had no authority to act for the company in that behalf said, at page 335 of the opinion: "We think under the facts of this case, the assured were warranted in treating the agent as a general agent of the company. Persons dealing with an agent cannot know, nor are they required to know, the limitations upon his power to represent his principal. The company is bound by the acts of its agent in the exercise of powers within the apparent scope of his authority, unless limitations upon such powers is brought to the notice of the assured." * * *

In our opinion the great weight of authority in this country and in England is to the effect that the apparent powers of a general agent managing the business of a foreign corporation [are equal to the powers of officials of the corporation itself, and] are as binding upon the principal as an express authority. * * * If the agent acts within the scope of either express or implied * * * or apparent authority, the principal is bound. * * *¹

FABER-MUSSER CO. v. WILLIAM E. DEE CLAY MFG. CO.

Supreme Court of Illinois, 1920. 291 Ill. 240, 126 N.E. 186.

CARTER, J. [This was a suit against appellee, the William E. Dee Clay Manufacturing Company, an Illinois Corporation, whose factory was located at Mecca, Ind., to recover \$20,000 damages for failure to deliver fire brick contracted for by ap-

¹ The dissenting opinion of Mack,
J., is omitted.

pellant from appellee through appellee's agent, Matthew M. Dee. Directed verdict and judgment for appellee in the trial court.]

The evidence shows that appellant is a dealer in building materials and that appellee is a manufacturer of fire brick and clay products. Appellee maintains an office at Springfield, Ill. (the only office it has in this state), which is in charge of its agent, Matthew M. Dee. The contract sued on consists of an order and letter attached thereto, bearing date May 14, 1917, addressed to appellee and signed by appellant. Opposite the signature of appellant to the order appears: "Accepted—Wm. E. Dee Clay Mfg. Co., per Matthew M. Dee." The evidence shows that Matthew M. Dee was, and had been for several years, in charge of the office of appellee at Springfield. As we understand the record, the evidence shows that the signs on this office indicated that it was the sales office of appellee. * * *

The evidence also tends to show that the Springfield agent of appellee had frequently solicited orders from appellant, but that prior to May 14, 1917, he had been unable to obtain any order; that on April 18, 1917, the appellant wrote a letter to William E. Dee at Springfield asking him to quote prices on fire brick; that Matthew M. Dee, the agent then in charge of the Springfield office, complied with the request and quoted prices by a letter (heretofore referred to as Exhibit 3) written on stationery bearing the printed letter head above set forth, designating the Springfield office as the Western sales office; that on May 14, 1917, in response to a telephone call from appellant, Matthew M. Dee went to Peoria and the order in question was then prepared in duplicate; that on the duplicate copy retained by appellant appear the words: "Accepted—Wm. E. Dee Clay Mfg. Co., per Matthew M. Dee." * * *

Appellant argues that appellee held Matthew M. Dee out to the world as its agent, and that as such agent he was authorized to make contracts such as the one sued on, and that, furthermore, appellee is now estopped by its acts from repudiating the acts of its agent because it has ratified them. The law is well settled that a principal is bound equally by the authority which he actually gives his agent and by that which by his own acts he appears to give. *Nash v. Classen*, 163 Ill. 409, 45 N.E. 276; *Doan v. Duncan*, 17 Ill. 272.

"Apparent authority in an agent is such authority as the principal knowingly permits the agent to assume or which he holds his agent out as possessing; such authority as he appears to have by reason of the actual authority which he has; such authority as a reasonable prudent man, using diligence and discretion, in view of the principal's conduct would naturally suppose the agent to possess." 2 Corpus Juris, 573.

"A general agent, unless he acts under a special and limited authority, impliedly has power to bind his principal by whatever is usual and proper to effect such a purpose as is the subject of his employment, and in the absence of known limitations third persons dealing with such a general agent have a right to act on the presumption that the scope and character of the business he is employed to transact measures the extent of his authority, and to hold the principal responsible for the agent's acts within such authority." 2 Corpus Juris, 581; see to the same effect, 21 R.C.L. 854.

"Where a principal has by his voluntary act placed an agent in such a situation that a person of ordinary prudence, conversant with business usages and the nature of the particular business, is justified in presuming that such agent has authority to perform a particular act, and therefore deals with the agent, the principal is estopped as against such third person from denying the agent's authority." 21 R.C.L. 907. * * *

The evidence shows, without contradiction, that appellee is an Illinois corporation; that since its organization the only office it has had in Illinois is the Springfield office, and that Matthew M. Dee, the agent who took this order, has been in entire charge of that office for seven or eight years. The evidence of William E. Dee, the president of the appellee corporation, is to the effect that his brother, Matthew M. Dee, was a traveling salesman, whose duty it was to solicit orders for appellee with his authority, limited to the approval and acceptance by appellee at its principal office in Indiana. It would be a somewhat unusual proceeding for a state to require that every corporation organized in the state for pecuniary profit should have a principal office in some county in the state, and yet to assume that such office could be a principal office and not have some one in charge who could bind the corporation in business matters. A person of ordinary prudence, conversant with business

usages and the nature of business affairs, it would seem, would be justified in presuming that a person in charge of such principal office in this state would be authorized to bind the company in any business transaction within the scope of its ordinary business. * * *

Reversed and remanded.

THAYER v. VERMONT CENT. R. CO.

Supreme Court of Vermont, 1852. 24 Vt. 440.

Book account. Judgment to account was rendered in the county court, and an auditor was appointed, who reported the facts substantially as follows: The item in controversy is for sixty-two days work of three men and six horses and carts, at \$7.50 per day—\$465.00. The services, of the plaintiff embraced in this charge, were rendered in removing earth from section 18 to 19, and were necessary to make grade on defendants' road, there being an excess of earth on section 18, and a deficiency on section 19; that without this removal from section 18 to 19, this excess would have been wasted and the company obliged to borrow elsewhere. That S. F. Belknap was original contractor with said Railroad Company, for the grading of said road throughout many sections, including sections 18 and 19; of which contract between said Belknap and said company the plaintiff had notice. That at the time plaintiff performed these services, he was to work under a contract, between himself and said Belknap, to grade said section 18, or a part of it.
* * *

The plaintiff contracted with Belknap solely to do said work, and to their contract the defendants were not a party, in its inception. That while the work was in progress by the plaintiff, one Newell, who was an assistant engineer on said road, in the employ of said company, and whose business it was to overlook and make estimates of the work, told the plaintiff, if he would move said earth from section 18 to 19, he should have his pay for it; that the company would pay him for the same; that in pursuance of that direction of Newell, the plaintiff went on and performed the work; that the plaintiff had no contract for work on section 19; that the work was actually

performed by the plaintiff, and was beneficial to the defendants; that had not the plaintiff made this extra haul from 18 to 19, the defendants would have been under the necessity of borrowing from elsewhere to fill up the space thus filled by the plaintiff's extra haul; that neither the plaintiff or any other person, has received pay for this extra work; that the same was undertaken and executed by the plaintiff, on the assurance of said Newell that he should be paid therefor by the company, that said Newell had no express authority to make such a contract. * * *

BY THE COURT. The item in controversy in this case, is for sixty-two days work of three men and six horses and carts, at \$7.50 per day, \$465.00. This is claimed, as extra haul of dirt from one section of defendants' road, which plaintiff had contracted with S. F. Belknap to build, to another section, by direction of one Newell, an assistant engineer of the company, under the assurance that the company would pay the plaintiff for it. * * *

And it seems to us equally obvious, that Newell could not bind the company by any such contract. If he could, so could all the engineers, and the defendants' position would be rendered somewhat perilous, and the restrictions in their written contracts would be of little avail. The auditor, it seems to us, entirely disposes of this; for he not only says, that this engineer "Newell had no express authority to make such a contract," but as has been before stated, that "no engineer had power to bind the company, by any contract for grading, or removing earth." This is too explicit to be evaded or overcome, unless we can see from the contract, or the relation of the engineers to the company, that the auditor has misconceived their power. * * *

And there is surely nothing in the general duties of an engineer, that would authorize him to employ others to do the work on the road, which by express contract belonged to the contractor to do. If he could do this, he might have rescinded the entire contract with Belknap, and let the work to others.

[The judgment for the defendant should be affirmed.]

GRAEF v. BOWLES et al.

Supreme Court of Oregon, 1926. 119 Or. 498, 248 P. 1090.

BURNETT, J. The plaintiff, an individual, sues the three defendants as members of a partnership called the Northwest Bridge & Iron Company and declares that on June 14, 1920, the defendants, at that time engaged in the construction of 7 steel vessels, made a requisition upon him to furnish labor and material for the painting of those vessels, which he accepted. The requisition and acceptance are as follows:

"Northwest Bridge & Iron Company.
"Purchasing Department.

"Requisition No. 3717.

"Portland, Oregon, June 14, 1920.

"J. A. Graef, Portland, Oregon: Please ship the following material to Northwest Bridge & Iron Company, Jefferson street, Portland, Ore.

"Description.

"Furnish all material and labor for painting our hulls, known as 40-46, inclusive, using first-class materials in accordance with plans and specifications, and all work to be done subject to approval of our engineers and owner's representative.

"Price of this work to be \$22,685 per boat, you to carry state insurance on all your men in the yard, and protect the Northwest Bridge & Iron Company from all claims, liens, etc.

"We reserve the right to purchase material for this work, or to designate where the material shall be purchased.

"This requisition is made in duplicate. Would ask you to please sign one and return.

"Distribution: Hulls 40-46, inclusive.

"Northwest Bridge & Iron Co.,
"[Signed] Ward C. Smith,
"Purchasing Agent.

"Accepted: J. A. Graef.

"No. 3717."

The execution of this paper by both parties is admitted. The complaint goes on to state, in substance, that at the time of the delivery and acceptance of the requisition, it was the custom of shipbuilding plants generally to require workmen employed there-

in to work only 8 hours per day and 5½ days per week, but, that for all work on any day over 8 hours or for work on Saturday afternoon or any time on Sunday, double the ordinary wages should be paid; that at the time of the execution and acceptance of said requisition, the defendants represented that in the construction of the vessels they would only employ a single shift of workmen, working 8 hours per day and 5½ days per week, and it was contemplated by both parties that plaintiff's bid for painting the hulls was based on the mutual understanding that only a single shift of men was to be employed 8 hours per day. The complaint further, in substance, states that about March 1, 1921, the defendants, acting by and through their general superintendent, notified the plaintiff that it was necessary that work on hulls Nos. 43–46, inclusive, be speeded up, and demanded of the plaintiff and ordered him to furnish additional labor, and to order all his workmen to work overtime, stating that the defendants, upon submission of plaintiff's bill for extra expense by reason of paying overtime to his employees, would have said bill approved and would pay the plaintiff the additional costs thus incurred. Claiming that this imposed upon him an additional burden and relying upon that promise, the plaintiff did work his men overtime and was compelled and did pay to his employees \$3,628.46 for overtime, which sum was the reasonable value thereof and, though demanded, the defendants have not paid the same. * * *

The case was tried before the circuit court and a jury. A verdict and judgment were rendered for the plaintiff and the defendants appeal. * * *

[Defendant contends that the court] erred in admitting in evidence a conversation said to have taken place between the superintendent of construction and the plaintiff after the work had progressed relating to speeding up the construction of the remaining four vessels. A Mr. Brown was the superintendent of construction referred to. He testified for the plaintiff that he was general superintendent in complete charge of construction for the defendant firm. There is testimony to the effect that the plant of the defendants was so arranged that all contracts for the furnishing of labor and materials used in the construction of vessels was to be made with the purchasing department. The plaintiff testifies [that this was known to him.]

The question principally for consideration at the present juncture is whether there was real or apparent authority in Brown to make a contract, either new or in modification of the admitted contract, to pay for overtime. * * *

It is a well-settled principle that one who deals with another as the agent of a third party does so at his peril. It is likewise a principle set forth in *Portland v. American Surety Co.*, 79 Or. 38, 153 P. 786, 154 P. 121, cited by the plaintiff, that:

"As to third persons the principal is bound by the acts of his agent, not only when executed in pursuance of actual authority, but also in the scope of his apparent authority arising from the manner in which his principal has held him out to the public. Apparent authority and its effect vanish, however, in the presence of the actual knowledge of the third party as to the real scope of the agent's authority, or when the former has knowledge of facts which would put him upon inquiry as to the actual warrant of the agent."

What was the authority, as disclosed by the testimony, conferred upon Brown by the defendants with respect to speeding up the work? It is found solely in the testimony of Brown upon that subject. He said, as already quoted:

"Well, the instructions were to speed up and get the boats in the water just about as fast as we possibly could."

Certainly that does not contain any intimation that defendants intended to modify the existing contract or to make a new one. The agent would exceed his actual authority, even if this were all that was said upon the subject, if in relying on that as his warrant he promised that the defendants would pay for overtime. * * *

In brief, Brown had no authority, as disclosed by the testimony of the plaintiff, to make any contract modifying or superseding the original contract. [In the absence of actual authority, express or implied, a general superintendent in charge of construction has no power to alter the contract which it is his duty to see carried out. Superintendents of construction are in general the executors, and not the authors, of the contracts into which their employers enter. Plaintiff may be presumed to have known this; at any rate, there is here no evidence of circum-

stances justifying plaintiff in assuming that Brown had any authority to change or alter the contract.]

The judgment of the circuit court is reversed, and the cause is remanded, with directions to enter a judgment in favor of defendants.

SOUTHERN PINE LUMBER CO. v. KING.

Court of Civil Appeals of Texas, 1940. 142 S.W.2d 560.

COMBS, J. This is a suit for damage for breach of a written contract wherein plaintiff (appellee here) alleges that defendant (appellant here) employed him to load all logs to be shipped to it and another concern at Diboll where its sawmill is located.

* * * The contract sued on was as follows:

"August 15, 1937.
"Shepherd, Texas

"Mr. D. C. King

"Shepherd, Texas

"In consideration of you purchasing and maintaining enough loaders and loader equipment in and near Shepherd to load all the logs, hardwood, pine and box factory pine, to be shipped to Southern Pine Lumber Company and Temple Manufacturing Company at Diboll, Texas, we will give you the loading of all of the logs to be shipped from the above place and will pay you \$1.50 per thousand feet Doyle Scale for all the logs properly loaded on cars.

"Yours very truly

"Southern Pine Lumber Company
"By: E. H. Kirkland

"Accepted:

"D. C. King"

Pursuant to the above contract the plaintiff in partnership with one George Hood purchased loading equipment consisting of two rigs, one powered by a tractor and the other by a Ford V-8 truck. Both were rigged up with winches so as to make two log loading outfits. The total cost was \$800, \$400 being paid by each. After about fifteen days plaintiff purchased Hood's interest and from that time on ran the log loading job alone. He loaded logs for the defendant from along in August, 1937, to May 1938, when

there was a temporary cessation of loading. About a month thereafter, the defendant without notice to plaintiff and without his consent employed another to continue loading logs at Shepherd. The plaintiff seeks to recover in this suit damages represented by the loss of profits which he would have made had he been permitted to complete the contract. It was stipulated that after plaintiff ceased loading logs a total of 4,333,958 board feet of logs were loaded out from Shepherd for the defendant. The plaintiff alleged that he would have made a profit of \$1 per thousand feet on the loading of said logs. * * * The defendant's theory was that its agent E. H. Kirkland, who purported to execute said written contract on its behalf had no authority, express or implied, to make the contract; that no responsible officer of the company ever saw the alleged contract or knew of its existence until long after plaintiff King ceased to load logs for it. It filed a plea of non est factum against the contract. It was contended that at the time the contract was made, there was not more than 40,000 feet of logs cut for shipment from Shepherd; that plaintiff loaded all of said logs for it and so exhausted the subject matter of the contract; the contract by its terms not covering logs not actually cut at the time it was made. The case was tried to a jury and in response to special issues, the jury found that E. H. Kirkland was the agent of the defendant at the time the contract was executed; that he acted within the scope of his authority; that plaintiff would have made a net profit of \$1 per thousand feet had he been permitted to fulfill his contract; that the difference in market value of the loading equipment as the result of the termination of the contract was \$525. They also answered certain other issues which have no bearing on the matters presented by this appeal. The trial court entered judgment for the plaintiff for \$4,333.98 loss of profits, and \$525 depreciation value of the loading equipment, making the total judgment \$4,878.98. * * *

By its first proposition the appellant contends there was no proof that the purported agent Kirkland "was fully authorized and empowered to make such contract * * * and was acting within the scope of his authority in binding defendant by the terms of said contract" as alleged by the plaintiff. Briefly stated, the facts show that Kirkland was a woods foreman for the appellant, his job being to locate and negotiate purchase of

timber and supervise the cutting, hauling, loading and shipment of the logs to the mill under the direction of his superior, D. C. Kenley. His job was to keep logs moving to the mill to keep it running. He appears to have had direct charge of the loading of logs at Shepherd for shipment by rail to appellant's mill. He had been employed by the appellant for eleven or twelve years. He frequently concluded agreements with log haulers and log loaders. However, Kirkland worked directly under Mr. D. C. Kenley, an official of the appellant company who was head of the department in which Kirkland worked. Mr. Kenley testified that Kirkland had no authority to conclude contracts for the purchase of timber or loading or hauling of logs without first referring the matter to him, Kenley, and getting his authority to conclude the contract; that it was not the practice of the company to make loading contracts in writing as was done in this case; that the company had prepared a set form of written agreement to be signed by all independent contractors for its benefit in connection with Social Security requirements, etc.; that Kirkland said nothing to him about this contract; that he had no knowledge of the existence of such contract until long after the appellee had ceased loading logs for the company.

We think appellant's contention is without merit. The testimony of appellant's own witness, Kenley, summarized briefly above, was that Kirkland had authority to conclude contracts for the loading operations, and that he did conclude such contracts. It should be noted that making contracts with log loaders, and others engaged in logging operations for the defendant, was part of the business entrusted to Kirkland as woods foreman. Such contractors connected with the operations at Shepherd dealt with Kirkland, and only with Kirkland. The requirement that such contracts be first submitted to Kenley for approval before Kirkland concluded them was a matter between the agent Kirkland and the company. There is nothing to suggest that such contractors knew or had any reason to suspect that he was not fully empowered to contract. He may have breached the duty which he owed his employer in concluding the agreement here involved without referring it to Kenley, but that did not affect the validity of the contract which he made with King, unless King knew of such limitation upon his authority. And as to that matter the

burden was on the appellant to show that King did have such knowledge.

It is a principle so well settled as hardly to require the citation of authority that where an agent in making a contract acts within the general scope of his authority, restrictions imposed by the principal will not affect the validity of the contract, unless such restrictions are brought to the knowledge of the person with whom he deals. *Morgan v. American Cent. Ins. Co.*, 80 W.Va. 1, 92 S.E. 84, L.R.A. 1917D, 1049; *Great Northern R. Co. v. O'Connor*, 232 U.S. 508, 34 S.Ct. 380, 58 L.Ed. 703. The remedy of the principal in such case is an action against the agent. *Bank of British North America v. Cooper*, 137 U.S. 473, 11 S.Ct. 160, 34 L.Ed. 759. It is only just that the principal, and not third persons with whom the agent has been sent forth to deal, shall suffer the consequences of the agent's breach of his principal's instructions. * * *

[Affirmed.]

PEOPLE ex rel. R. T. FORD CO. v. LEWIS et al.

Supreme Court of New York, Appellate Division, Fourth Department, 1913.
159 App.Div. 612, 145 N.Y.S. 862.

[Application by the People of the State of New York, on relation of the R. T. Ford Company, a corporation, for mandamus against F. Park Lewis and others, constituting the Board of Managers of the New York State School for the Blind at Batavia, N. Y. From a judgment issuing a peremptory writ, respondents appeal. Reversed.]

Foote, J. Appellants, who are the board of managers of the New York State School for the Blind at Batavia, appeal from an order of the Special Term which awards to relator a peremptory writ of mandamus, requiring said board to pay or direct the payment to relator, in the form provided by law, of the sum of \$16,385.60 and interest as part payment to relator upon the contract between the parties for the construction of a new building upon the grounds of said school.

The only question involved is as to the power of the State Architect to change the specifications of the contract as to the foundations of the building so as to substitute foundations made

of Portland cement concrete for the blue Indiana limestone, with brick backing, required by the contract. This change was authorized and directed by the State Architect, without authority from the board of managers and without their knowledge, because of representations by relator that it would not be able to procure the Indiana limestone in time to permit erecting the foundations and exterior walls sufficiently early to allow the work of interior finishing to proceed during the winter, thus probably delaying the completion of the building beyond the contract date of June 4, 1913. After the change was authorized, but before relator began to construct the concrete foundation, the board of managers notified relator that it would not consent to such change, whereupon relation referred the matter to the State Architect, who instructed relator to proceed to erect the foundations in concrete, notwithstanding the objections of the board of managers, and, in reply to communications from the board of managers on the subject objecting to such change, the State Architect stated in substance that he had authorized the change to avoid delaying the construction of the building; that he considered it within his jurisdiction to do so, and that the law did not require "minor changes of this nature" to be approved by the board of managers, but the intent of the law left such matters to the discretion of the State Architect. Relator decided to act on the assumption that the State Architect has authority to authorize the change in spite of the objection of the board and proceeded to build the foundations of concrete. On January 14, 1913, the State Architect certified to the board of managers that \$16,385.60 had become due and payable to relator, being 85 per cent. of the work performed to that date, including the finished concrete foundations. The board has refused to make the necessary order or certificate to have this sum paid to relator by the state. The building has since been completed by relator. Meantime, a new State Architect has been appointed, who refuses to give relator any further certificates pending settlement between relator and the board in reference to the foundation walls, and relator has received no part of the \$37,000 which by the contract it was to receive for erecting this building.

The inquiry, therefore, is whether the State Architect has the authority, by statute or by the contract between the board of managers and relator, to direct or allow relator to substitute a

concrete foundation for the cut stone and brick foundation required by the contract, without the consent and against the objection of the board of managers, who are the parties to the contract with relator. * * *

We find nothing in the statutory provisions (defining the powers of the state architect) which confers upon (him) authority to himself make any substantial or material alteration in the contract for this building. He is a state officer and not an agent of the board of managers. His duty as state architect is, in the words of the statute, to "see that the material furnished and the work performed in constructing * * * such building are in accordance with such drawings and specifications, and that the interests of the state are fully protected"; and it is for this purpose only that he is to "supervise and control, as architect, the construction of all new buildings erected at the expense of the state." Architects employed by individual owners for the erection of buildings have not, by virtue of the nature of their employment, the power to consent to the alteration of a contract between the owner and the contractor, in the absence of (direct) authority from the owner.

[The court goes on to hold that there is nothing in the contract in this case which vests the state architect with such power, and concludes that, since neither in the statutory provisions nor in the express contract is the power given, it is wholly lacking.]

Order reversed, with costs, and motion denied. All concur.

HOWARD v. WINTON CO.

Supreme Court of California, 1926. 199 Cal. 374, 249 P. 511, 47 A.L.R. 1012.

PER CURIAM. Plaintiff instituted this action to recover \$4,637.-83 asserted to be owing to him for services rendered the defendant company as sales manager of its Los Angeles branch. Briefly, the complaint set forth that this sum was due under the terms of a written contract, dated October 20, 1919, alleged to have been executed by the parties to the action. The contract, a copy of which is incorporated in the complaint, specifies that the plaintiff is to receive, while serving as sales manager of defendant's Los Angeles branch, \$175 a month, and, in addition

thereto, 1 per cent. on all retail sales made by him and 10 per cent. of the net profits of said Los Angeles branch. It is alleged in the complaint that the net profits of said branch of the defendant company for the fiscal year ending October 31, 1920, during which time the plaintiff served as its sales manager, were \$46,378.35.

At this point it may be well to state that the plaintiff received, while in the employ of the Los Angeles branch of the defendant company, a monthly check for \$175 from the home office of the defendant company. He has made no attempt to recover 1 per cent. commission on any retail sales made by him personally. At no time during the conduct of this action has he made demand for any compensation other than the 10 per cent. of the net profits of the Los Angeles branch.

The copy of the contract appearing in the body of the complaint shows that it was not signed in the name of the defendant company, nor by any of its executive officers. It was, however, signed by one H. L. Owesney and by the plaintiff. The record points to said H. L. Owesney as manager of the Los Angeles branch of the defendant company. * * *

The case, therefore, reduces itself to a single proposition, namely, whether the general manager of a business may, in the absence of express and particular instructions, contract to distribute to an employee a share of the net profits of said business; or, in other words, is the general manager of a business clothed with implied authority to contract away the profits of the business?

Neither the research of counsel nor our own efforts have brought to light a California case passing upon the identical point here presented. The authorities are ample to the effect that a general manager has implied authority, within reasonable limits, to employ, discharge, and determine the compensation of employees. In addition, there are declarations, hereinafter quoted, to the effect that the execution of a contract disposing of a portion of the profits of a business is unreasonable, and not within the implied authority of the general manager of such business.

In 1 Mecham on Agency, pp. 711, 712, it is stated that: "A general manager, put in complete charge of a business in which

servants, and the like, are ordinarily employed, would have implied authority, within the range of what is reasonable and proper, to employ the necessary help. In doing so, he may make contracts of a usual and reasonable sort, such as, for example, the hiring of an employee for a year; or the assumption of the risk of the employee's competency to fill the position. He would not, on the other hand, have any implied authority to contract to give the employee, as part of his compensation, an interest in the principal's business or its profits." * * *

We are in accord with the rule enunciated in *Mechem on Agency*, *supra*, and *Deffenbaugh v. Jackson Paper Mfg. Co.*, *supra* [120 Mich. 242, 79 N.W. 197], and this whether or not its declaration in the latter was dictum. The rule that a general manager or superintendent may not, in the absence of express authority, contract to distribute to employees a portion of the profits of a business would appear to be dictated by sound business considerations. Were the rule otherwise, and should it be held that such power fell within the implied authority of a general manager or agent, it might be carried to unreasonable limits. And persons entering into contracts for a portion of the profits of a business should, for their own protection, make inquiry as to the actual authority of a general manager or agent in this respect. In the absence of such inquiry or of an estoppel or ratification, the principal should not be bound by the provisions of such a contract. * * *

For the reasons herein advanced, the judgment appealed from is affirmed.

GILLIS v. DULUTH, N. S. & S. W. R. CO.

Supreme Court of Minnesota, 1885. 34 Minn. 301, 25 N.W. 603.

BERRY, J. This is an action to recover pay for engineering services rendered by plaintiff and his minor son to defendant, and for money expended by plaintiff for defendant in connection therewith. That defendant is a railroad corporation, and that the services sued for were performed upon a line or route within the scope of its articles of incorporation, is undisputed. It is also undisputed that Tranah was one of the defendant's chief engineers, and as such employed by defendant "to survey and

establish" the line of its road. It was also shown, without contradiction, that "a chief engineer is the superintendent of everything connected with the location and construction of the road." There was also competent evidence tending to show that, assuming to act as such chief engineer, Tranah employed plaintiff to perform, and procure to be performed, the services, and to make the expenditures sued for. That Tranah did thus in fact employ the plaintiff was not disputed in evidence, but the defendant insisted, and introduced what was equivalent to evidence tending to show, that Tranah and a partner took of defendant a contract "to survey and establish" the line of defendant's road, and "supervise the construction thereof," at the price of \$1,000 per mile; themselves paying, as we understand it, the expenses of so doing; and that they had no authority to make any contract by which defendant would be bound to pay any part of such expenses.

Now, upon the foregoing state of the evidence, admissions, and undisputed facts in the case, and upon the further evidence as to the performance of the services and the making of the expenditures sued for, there would seem to be no doubt that the jury was warranted in finding for the plaintiff. The jury were at liberty to find that, *prima facie*, Tranah's employment as defendant's chief engineer, "to survey and establish" its line, clothed him with apparent authority to employ, on behalf of defendant, such subordinates, and incur such expenditures, as were reasonably suitable to that end, and such as the evidence tended to show plaintiff's services and expenditures to have been (*Hooker v. Eagle Bank*, 30 N.Y. 83; *Crowley v. Genesee Min. Co.*, 55 Cal. 273); and there was no evidence introduced to show that the alleged special employment of Tranah and his partner to do the surveying, etc., for a gross sum per mile, they paying all expenses thereof, was ever communicated to plaintiff. And it follows that the jury were at liberty to find that defendant was bound by Tranah's action in the exercise of his apparent authority in employing plaintiff, and authorizing him to make necessary expenditures. Authorities supra.

These conclusions appear to us to dispose of the case; for, in view of the admitted and undisputed facts above mentioned, the many exceptions taken to the testimony as to who the defendant's directors were, and what they said and did, be-

comes unimportant. Tranah's apparent agency is made out without any dependence upon that testimony, and by defendant's own admission. If there was any error in receiving that testimony, it cannot have substantially prejudiced the defendant, as there is nothing further in the case which appears to us to demand special consideration here.

The order denying a new trial is affirmed.

SPECIAL CASE WHERE THE PRINCIPAL IS A PUBLIC CORPORATION

The doctrine of liability of the principal for acts done by an agent, outside the scope of his real authority, but within his apparent power, does not extend to cases where the principal is a public corporation. Here all parties are put on notice of the actual limit of the agent's authority. In other words, as to a public corporation there is no doctrine of apparent powers of an agent.

McDONALD v. MAYOR, ALDERMAN AND COMMON- ALTY OF THE CITY OF NEW YORK.

Court of Appeals of New York, 1876. 68 N.Y. 23, 23 Am.Rep. 144.

Appeal from order of the Supreme Court reversing a judgment in favor of plaintiff entered upon a verdict, and granting a new trial.

[This action was brought to recover the contract price for gravel and stone delivered to the department of roads of the city of New York upon the order of the superintendent of roads. The city interposes the defense that, since the superintendent did not act in accord with the statutory requirements, there can be no liability, inasmuch as his real authority depends upon such compliance, and he has no apparent authority since all persons dealing with a municipal corporation through an agent are presumed to know the extent of the agency.]

FOLGER, J. The plaintiff * * * does not * * * prove * * * that a necessity for the purchase or use of the materials was certified to by the head of the department of public works, or that the expenditure therefor was authorized by the

common council (Laws of 1857); * * * nor did he aver or prove in terms, that a contract for the purchase of the materials was entered into by the appropriate head of department, upon sealed bids or proposals, made in compliance with public notice advertised. * * * The existence and stringency of these statutory provisions are recognized by plaintiff's counsel, but the force of them is sought to be avoided. It is urged, that the object of the expenditure was proper, as it is part of the defendants' corporate duty to keep public ways in repair; that the material was delivered to the superintendent of roads, an official of the defendant, charged with carrying that duty into practical effect; and that the plaintiff had reason to believe that the superintendent was acting within the line of his duties. The first two of these propositions may be admitted; the third may not be. Doubtless, to the apprehension of the plaintiff, the superintendent was so acting, as to do work which it was the duty of the defendant to cause to be done. But we see nothing in the case which brought to his mind, so as to create a belief, that there had been a contract made for the material, as above indicated, or that the necessity for the expenditure had been certified to and authorized, as required by law. And though the superintendent of roads had certified to be correct, the bills for the materials, rendered by the plaintiff, this did not meet the letter of the statute laws.

Such certification did not precede the reception of the material; nor was the certification by the head of the department; nor was the taking and use of the material, nor payment for it, authorized by the common council. Nor can it be that the provisions of the statute, are alone for the instruction of the department and officials of the defendant. They were a restraint upon them, but upon other persons as well. They put upon all who would deal with the city, the need of first looking for the authority of the agent with whom they bargain. Quite clearly do they impose upon the paying agent of the defendant a prohibition against an unauthorized expenditure. And are they not also a restraint upon the municipality itself? They are fitted to insure official care and deliberation, and to hold the agents of the public to personal responsibility for expenditure; and they are a limit upon the powers of the corporation, inasmuch as they prescribe an exact mode for the exercise of the power of expenditure.

It is said that the plaintiff had a right to presume, that the agents of the defendant transacted their business properly, and under sufficient authority. Does not this involve, also, that the plaintiff had a right to presume, that it was the business of the superintendent of roads to purchase material for the city upon the credit of the city, and that he had authority so to do? This cannot be maintained. It is fundamental, that those seeking to deal with a municipal corporation through its officials, must take great care to learn the nature and extent of their power and authority. * * *

Judgment affirmed.

MILLER et al. v. GOODWIN et al.

Supreme Court of Illinois, 1873. 70 Ill. 659.²

SCHOLFIELD, J. * * * The general principle of law is settled, beyond controversy, that the agents, officers, or even city council, of a municipal corporation, cannot bind the corporation by any contract which is beyond the scope of its powers, or entirely foreign to the purposes of the corporation, or which (not being, in terms, authorized) is against public policy. This doctrine grows out of the nature of such institutions, and rests upon reasonable and solid ground. The inhabitants are the corporators—the officers are but the public agents of the corporation. Their duties and powers are prescribed by statute or charter, which all persons not only may know, but are bound to know. The opposite doctrine would be fraught with such danger, and accompanied with such abuse, that it would soon end in the ruin of municipalities, or be legislatively overthrown. These considerations vindicate both the reasonableness and necessity of the rule, that the corporation is bound only when its agents or officers, by whom alone it can act, if it acts at all, keep within the limits of the chartered authority of the corporation. * * * It results from this doctrine, that unauthorized contracts are void, and, in actions thereon, the corporation may successfully interpose the plea of *ultra vires*, setting up,

² Statement of facts is omitted.

as a defense, its own want of power, under its charter or constituent statute, to enter into the contract. * * *

The decree of the court below will be affirmed.

Decree affirmed.

SECTION 2.—PRINCIPAL'S LIABILITY IN CONTRACT— DOCTRINE OF UNDISCLOSED PRINCIPAL

1. IN GENERAL

An undisclosed principal is bound by contracts made on his account by an agent acting within his authority, except—

1. Where the third party has elected to hold the agent, rather than the principal;
2. Where the contract is a negotiable instrument;
3. Where the contract is under seal;
4. Where the principal has paid the agent, acting in the belief induced by an act of the third party that the agent had settled with the third party;
5. Where the agent has exceeded his authority.

Where the agent has acted on his principal's account, but in his own name, not disclosing that he was acting for another, it is clear that the resulting contract is actually between the principal and the third party. Since the principal, though undisclosed, is actually though not apparently a party to the contract, it follows that he may sue and be sued on it. The agent also may be held on the contract, since it would be unfair to deprive the third party of a right he contracted for, namely, to hold the person he contracted with. Thus, the third party, on discovery of the principal's existence, has an election to hold either the agent or the principal. If he has made an election of his choice, he is bound by it. It remains to consider what constitutes an election.

Where the agent signed in his own name but on behalf of his undisclosed principal, a negotiable note, the third party can only hold the agent on the note, for no one may be sued on a negotiable instrument whose name does not appear thereon. Still the third

party may sue on the underlying contract, the debt, and hold the principal.

As to a sealed instrument, no one may be sued whose name does not appear on the written contract. This is because of certain historical incidents relating to contracts under seal. The sealed instrument merges the underlying contract, it being thus discharged.

If the undisclosed principal has paid his agent, relying on conduct of the third party indicating that the agent had already paid or settled the account, such payment discharges the principal. So if P through A buys goods from T, and T by mistake gives A a received bill which A shows P as evidence of settlement, P's payment to A discharges P.

Where the agent has exceeded his actual authority, the undisclosed principal may not be sued, for he is of course no more a party to the contract than in the case of an unauthorized agent acting for a disclosed principal.

MANCHESTER SUPPLY CO. v. DEARBORN.

Supreme Court of New Hampshire, 1940. 90 N.H. 447, 10 A.2d 658.

Proceeding by the Manchester Supply Company against Leah Dearborn, and another, to discover the interest of the other defendant in real property of the named defendant and to subject that interest to satisfaction of a judgment obtained by plaintiff against the other defendant. The bill was ordered dismissed, and the plaintiff brings exceptions. * * *

Petition, brought originally for the purpose of discovering the interest of the defendant Fred in the real property of his wife, the defendant Leah, and to subject that interest, if any should be found, to the satisfaction of a judgment obtained by the plaintiff against Fred. Prior to trial before a master, the plaintiff, without objection by the defendants, was allowed to amend its bill by substituting for the original prayers one in which it sought to hold the defendant Leah on the ground that she was her husband's undisclosed principal. * * *

The master, after reciting in summary the testimony of the defendants, both of whom were called to the stand by the plaintiff, made the following findings:

"Fred Dearborn had conducted a plumbing business as an independent contractor for many years, and had done business with the plaintiff company as such independent contractor. The goods in question were purchased on an open account between the plaintiff and Fred Dearborn, and so far as anything appears to the contrary, the plaintiff intended to give exclusive credit to Fred Dearborn. The items sued for were sold by the plaintiff on Dearborn's credit, and the plaintiff expected him to pay for them.

"The only basis for a finding of agency with an undisclosed principal is the plaintiff's assumption that Leah was the undisclosed principal of her husband because of the fact that he was her husband and the goods were purchased for use in her property. Against that assumption, we have the facts as found, and the testimony of Leah Dearborn with particular reference to Dearborn's dealings with the plaintiff over a period of years as an independent plumbing contractor.

"The Master finds no basis to treat this transaction of Fred Dearborn with the plaintiff any differently from others over a period of years wherein Dearborn did business with the plaintiff; and therefore finds that Dearborn was not acting as the Agent of Leah Dearborn, but as an independent contractor."

It appears that the articles purchased from the plaintiff were various items of heating equipment which the defendant Fred installed in a house owned by his wife and in which they both lived. * * *

WOODBURY, J. After contrasting English law with the continental systems, Professor Mechem in his work on agency writes that "it is unquestionably the general rule of our law that an undisclosed principal, when subsequently discovered, may, at the election of the other party, if exercised within a reasonable time, be held upon all simple non-negotiable contracts made in his behalf by his duly authorized agent, although the contract was originally made with the agent in entire ignorance of the principal." 2 Mechem on Agency, 2nd Ed., § 1731. * * * Later in the above section of Professor Mechem's work it is said, "The rule itself is doubtless an anomaly, but even so it is un-

doubtedly as well settled as any other rule of the law of agency." It has for many years been in effect in this state. *Chandler v. Coe*, 54 N.H. 561; *Bryant v. Wells*, 56 N.H. 152, 155.

From the authorities cited above as well as from the very nature of the situation, this right of action does not depend upon the third person's knowledge, when dealing with the agent, that the latter was acting for another instead of for himself. Obviously everyone, when dealing with an agent for a wholly undisclosed principal, believes that he is dealing with the agent only, relies solely upon the agent individually, and, if credit be extended, extends that credit to no one but the agent. However, and herein lies the anomaly, the creditor has a right of action against the undisclosed principal, when discovered, even though he never learned of the existence of the latter until after the bargain was completed, if he can prove, as in every other case of agency, that the agent's acts were within the scope of authority. 1 Am.Law Ins., Restatement of Agency, §§ 194, 195; 1 Williston on Contracts, supra [Rev.Ed., § 286]; 2 Am.Jur., Agency, § 401; 3 C.J.S., Agency, § 245; *Platts v. Auclair*, 79 N.H. 250, 252, 108 A. 167. The fundamental question in the case at bar, then, is not whether the plaintiff, when it sold the items of heating equipment to Fred, believed that it was dealing with Fred alone and individually, but it is whether or not Leah ever authorized Fred to make those purchases for her and in her behalf.

This is the question which the plaintiff brought to the attention of the master by its request for a finding referred to earlier in this opinion, and that question does not appear to have been properly passed upon. While it is true that there are findings to the effect that Fred was not acting as the agent of his wife when he purchased the items of heating equipment, it is evident from those findings themselves as well as from their context, that the master's conclusion of lack of agency was based at least in part upon his findings with respect to the plaintiff's belief at the time of purchase that it was dealing with Fred alone and in his individual capacity. These latter findings concerning the transactions between Fred and the Plaintiff shed no light upon the real question in this case which whether or not Fred, when dealing with the plaintiff, was, unknown to it, acting as the agent of his wife. From this failure to comprehend the nature of the issue

presented, it follows that there must be a new trial as to the defendant Leah. * * *

2. EXCEPTIONS TO THE LIABILITY OF THE UNDISCLOSED PRINCIPAL

(1) *Election to Hold Agent*

If after knowledge of the existence of the undisclosed principal and his identity, the third party sues the agent and pursues his claim to judgment, he has thereby made his election to hold the agent, and the principal is discharged.

LINDQUIST v. DICKSON.

Supreme Court of Minnesota, 1906.

98 Minn. 369, 107 N.W. 958, 6 L.R.A.,N.S., 729, 8 Ann.Cas. 1024.

Action by August Lindquist against Ella M. Dickson. There was a verdict for plaintiff, and from an order denying motion for a new trial, defendant appeals.

START, C. J. Action to recover from the defendant, as an undisclosed principal, for labor and material performed and furnished by the plaintiff in decorating and repairing her house, pursuant to an alleged contract made for her by her husband, Joseph M. Dickson. The complaint alleged, in effect, that, at the time the contract was entered into with the husband he was in fact acting as agent for his wife, the defendant, but he failed to disclose to the plaintiff the fact of such agency, or the fact that she was the real party in interest and owned the house, the decorating and improvement of which was the subject-matter of the contract; that the plaintiff performed the contract on his part; that he was not paid therefor; and that he commenced an action against the husband to recover the balance due him on the contract, and on August 29, 1904, he recovered judgment against him for the sum of \$273.68, no part of which has been paid; and further that thereafter (in the month of October, 1904) the plaintiff learned for the first time that the defendant was the real party in interest, and that the contract was made for her by her husband as her agent. This action was commenced in the month of June, 1905.

* * * The trial resulted in a verdict in favor of the plaintiff for the amount stated, and the defendant appealed from an order denying her motion for a new trial. * * *

It is not controverted that the plaintiff, at the time the contract was made, understood that the house he was to decorate and improve belonged to the husband, and that he was dealing with him as principal, and further that he recovered judgment against the alleged agent upon the same claim which is the basis of this action, in ignorance of such alleged agency. It is the contention of the defendant that such judgment is a bar to this action.

The general rule is that, where a simple contract, by parol or writing, is made by an authorized agent without disclosing his principal, and the other contracting party subsequently discovers the real party, he may abandon his right to look to the agent personally and resort to the principal. * * * But whether the creditor can proceed against the undiscovered principal, after he has obtained a judgment on his claim against the agent, is a question as to which the adjudged cases are conflicting. In the case of *Kingsley v. Davis*, 104 Mass. 178, the creditor, after being fully informed that the party with whom he made the contract was acting for an undiscovered principal, brought an action against the agent and recovered judgment for his claim. Afterwards he brought an action against the principal to recover for the same claim, and the court held that the action against the principal could not be maintained for the reason that: "The general principle is undisputed that, when a person contracts with another who is in fact an agent of an undisclosed principal, he may upon the discovery of the principal resort to him or to the agent with whom he dealt at his election. But if, after having come to a knowledge of all the facts, he elects to hold the agent, he cannot afterwards resort to the principal." In *Beymer v. Bonsall*, 79 Pa. 298, it was held that nothing short of satisfaction of the judgment against the agent would discharge the principal.

The case of *Kingsley v. Davis* suggests the true basis for solving the question. It is a question of election. Election implied full knowledge of the facts necessary to enable a party to make an intelligent and deliberate choice. * * * We therefore hold upon principle, and what seems to be the weight of judicial opinion, that: If a person contracts with another, who is in fact

an agent of an undisclosed principal, and, after learning all the facts, brings an action on the contract and recovers judgment against the agent, such judgment will be a bar to an action against the principal. But an unsatisfied judgment against the agent is not a bar to an action against the undiscovered principal when discovered, if the plaintiff was ignorant of the facts as to the agency when he prosecuted his action against the agent. * * *

Order affirmed.

(2) *Exception in the Case of Promissory Notes*

An undisclosed principal is not liable as a party to a negotiable instrument.

WEBSTER v. WRAY.

Supreme Court of Nebraska, 1886. 19 Neb. 558, 27 N.W. 644, 56 Am.Rep. 754.

COBB, J. * * * The point upon which the rehearing was allowed, and upon which we think the case turns, is that while in the case of contracts, generally, where one of the persons executing the same executes it in his own name, without disclosing any one as his principal or his own character as an agent, if in point of fact he was acting as the agent of another party, such other party will be held to be the real party to the contract, yet that this rule does not apply to negotiable promissory notes. This question was ably argued at the bar, as well as by exhaustive briefs by counsel on either side. An examination of the authorities cited by counsel, with others referred to therein, led us all, at the consultation, to the conclusion that the above proposition as to both its branches expresses the law correctly. Being about to enter upon a collation of authorities upon the point of the non-liability of an unnamed principal upon negotiable paper, my attention was attracted to a citation on page 284, 1 Daniel, Neg. Inst., to an article in 13 Alb.Law J. No. 19, May 6, 1876, p. 323. This article I find so exhaustive of the subject that I will content myself by giving the conclusions of the writer, and the authorities by him cited. Says our author: "But as to bills of exchange and promissory notes, it has been long settled that he who takes

negotiable paper contracts with him who, on its face, is a party thereto, and with no other person. By Lords Abinger and Parke, *Beckham v. Drake*, 9 Mees. & W. 92, 96; *Byles, Bills*, 37; *Story, Bills*, § 76; *Edw. Bills*, 80." Hence evidence is not admissible to charge any other person thereon upon the grounds of his having been the copartner or principal of the party named. *Metc. Cont.* 108; *Draper v. Massachusetts Steam-Heating Co.*, 5 Allen, Mass., 340. The rule is general, if not universal, that neither the legal liability of an unnamed principal to be sued, nor his legal right to sue on a negotiable instrument, can be shown by parol evidence (*Fuller v. Hooper*, 3 Gray, Mass., 334, per *Metcalf, J.*) even as between the immediate parties to the transaction, and although an agency is disclosed upon the face of the instrument, where the word "agent" or something equivalent is added to the signature of the party signing the instrument. * * * It is held that although the party executing the instrument describes himself as "agent," yet, if the name of the principal is not disclosed upon the face of it, all evidence dehors the instrument, for the purpose of holding him thereon, is to be excluded. It is wholly immaterial, therefore, that the agent had full authority to make it in behalf of his principal; that the consideration was exclusively received for his benefit; that the plaintiff knew the agent's principal, and accepted the note as the promise of the principal.
* * *

Upon reargument and reconsideration of the authorities, we reach the conclusion that the district court erred in admitting evidence on the trial introduced by the plaintiff for the purpose of showing that T. B. Webster executed and delivered the promissory notes, set out in the first and third causes of action in the amended petition of the plaintiff in said court, as the agent or partner of E. D. Webster, and in holding said E. D. Webster thereon. The judgment of the district court is therefore reversed, and the cause remanded for further proceedings in accordance with law.

(3) *Exception in the Case of Contracts Under Seal*

An undisclosed principal is not liable as a party to a sealed instrument.

WALSH v. MURPHY et al.

Supreme Court of Illinois, 1897. 167 Ill. 228, 47 N.E. 354.

CARTWRIGHT, J. The appellate court reversed a decree, obtained by appellant in the circuit court of Cook county, establishing a mechanic's lien in his favor against premises which appellees purchased after the lien was claimed to have attached to the property. The cause was not remanded, and appellant has brought the case here, asking a reversal of the judgment of the appellate court, and an affirmance of the decree of the circuit court in his favor. Annella Rood was the owner of the premises when the contract was made and the material and labor furnished by appellant. She commenced to construct an apartment building on the property through the agency of her husband, Francis D. Rood, and on March 1, 1893, appellant and said Francis D. Rood entered into a written agreement, of that date, under their hands and seals, by which appellant covenanted and agreed to superintend, manage, and carry on the plumbing, gas fitting, and sewerage for the building, to buy all material in his own name, and contract for all labor, and Francis D. Rood covenanted and agreed to pay appellant $7\frac{1}{2}$ per cent. on the total cost of all labor and material used in said plumbing, gas fitting, and sewerage, and to pay for all the material and labor. The instrument did not purport to be entered into on behalf of Annella Rood, the owner of the premises, nor did the fact of her ownership or her husband's agency appear in any manner in it, but it purported to be made and entered into by him as principal. Aside from the form of the instrument, appellant in fact dealt with Francis D. Rood as principal and owner of the property, and did not learn that Annella Rood was the owner until after he quit work, when he ascertained the fact by his solicitor's examination of the abstract of the record. * * *

If Annella Rood was a party to this contract as an undisclosed principal, so as to give a right of action against her then appellant was entitled to a lien; but if it was not a contract with her, then the judgment of the appellate court was right. The rule in regard to instruments under seal made by an agent is that, in order to bind the principal and to make it his contract, it must purport on its face to be his contract, and the seal must purport to

be his. An agent cannot ordinarily bind the principal by a sealed contract executed in his own name, nor can the principal ordinarily avail himself of such a contract and sue the other contracting party thereon. An undisclosed principal, whose authorized agent has made such a contract in his behalf, can neither sue nor be sued on it. Story, Ag. §§ 147-154, 160. * * * This rule was laid down in this state as early as 1827 in *Mears v. Morrison*, Breese, 223. In that case William Morrison was sued on an instrument under seal signed "Guy Morrison, Agent," and dated June 17, 1818, by which he sold to William Mears, plaintiff, the time that a negro girl named Harriet and her children had to serve the defendant William Morrison, she being a daughter of a servant of said Morrison, indentured under the laws of the territory of Illinois concerning the indenturing of slaves. The trial court arrested the judgment upon the ground that the instrument declared on created no liability on the defendant, William Morrison. This was held to be right, because the covenant was that of Guy Morrison, the agent, and the seal was not the seal of William Morrison. * * * In *Campbell v. Jacobson*, supra [145 Ill. 389, 34 N.E. 39], where the appellant sought to establish a mechanic's lien on the land of Fanny Jacobson under a sealed contract made by Morris Jacobson, her husband, it was intimated that the wife could not be held liable as an undisclosed principal, but the cause was decided on other grounds.

A different rule prevails as to contracts not under seal, and as to such contracts, if the nature and circumstances of the transaction show an intention to bind the principal, and not the agent, effect will be given to such intention. The fact that the contract made by Francis D. Rood would have been valid without a seal, and that therefore the authority to execute it might be by parol, is immaterial. * * * No lien is created except by statute, and there could be none unless this contract was with the owner; and, as we have seen, this contract was not with the owner. She could not have had any right of action upon it against appellant for a failure to perform it, or on account of the manner of its performance, nor could any action be maintained against her under it. It follows that there was no lien acquired, and the judgment of the appellate court will be affirmed. Affirmed.

(4) *Exception Where Undisclosed Principal has Paid Agent*

An undisclosed principal is discharged from liability to the other party if he has paid or settled accounts with the agent relying on conduct of the third party indicating that the agent has settled the account.

Another exception to the general rule is where the principal has already settled with the agent before he learned of the claims of the third party, under the belief, induced by some act of the third party, that the third party either had settled with the agent or had given credit solely to the agent and was not looking to the principal. Here the principal cannot be held to pay the second time. And, conversely, the principal cannot hold the third party to payment the second time where payments have been made to the agent before the principal was discovered. In fact, any defenses acquired by the third party as against the agent before discovery of the principal may be asserted against the principal.

(5) *Exception Where Agent Exceeded his Authority*

If the agent has acted outside his authority, express, implied, or apparent, the rule is the same whether the principal be disclosed or undisclosed; he cannot be held liable on the contract.

The rule of apparent authority is applied to the undisclosed principal, even though the third party was dealing solely with the agent as principal. If after the disclosure of the actual principal the agent's act may be said to have been within the scope of his apparent authority, the principal may be held, notwithstanding his actual instructions to the agent. For example, suppose that P authorized A to sell a horse in a market where it was the custom and usage to sell horses under express warranties. P. instructs A not to warrant. In violation of his instructions, A sells under an express warranty, in his own name. On discovery that A had acted for P, the third party could hold P for breach of the warranty, since under the circumstances A had the apparent, though not the real, authority to warrant.

SECTION 3.—AUTHORITY BY RATIFICATION

1. IN GENERAL

Authority by ratification is the subsequent acceptance or approval, actual or implied, by the principal, of the unauthorized act of another as his agent.

One may purport and pretend to act for another as his agent without any authority whatsoever; or, being authorized to do one thing, may do another wholly different and beyond his authority. In such cases the principal can of course repudiate the act when he learns of it, but he may be glad to accept and approve it as done for him. He then ratifies, and may be said to have created an agency; and the agency is considered as dating back to the time of the performance of the act. The following conditions must be present in any ratification: (1) The principal must have been disclosed or partially disclosed, i. e. the act must have purported to be an act of agency for the person ratifying as principal, although the principal's identity need not be disclosed. (2) The principal must have had full knowledge of the material facts about the act, or an opportunity of such knowledge so as to be chargeable with it, prior to his ratification. (3) The act must be one that the principal was capable of performing and of authorizing both at the time of its performance and at the time of its ratification. (4) The principal's ratification must be made within a reasonable time after he learns of the act, and before the other party has withdrawn from it. (5) The principal cannot ratify in part and repudiate in part. He must ratify all or none.

MEMPHIS & CHARLESTON R. CO. v. SCRUGGS.

Supreme Court of Mississippi, 1874. 50 Miss. 284.

[Action to compel payment of an arbitration award. The material facts were that pursuant to a construction contract whereby the plaintiff, Scruggs, was to build a hotel for the Mem-

phis and Charleston Railroad Company, a dispute arose as to whether the building conformed to the plans and specifications. The president of the railroad entered into a contract with Scruggs to refer the dispute to arbitration of a board of three members, the amount fixed by the award to be binding on the parties. The arbitrators arrived at a decision against the railroad company, and the company refused to recognize the validity of the award as binding on it on the ground that the president had no authority to contract to submit a claim to arbitration. It was admitted that a president of a corporation does not, by virtue of his office alone, have implied authority to bind the company on an arbitration agreement.]

PEYTON, C. J., delivered the opinion of the court.

It is contended by counsel for appellants that M. J. Wicks, the president of the Memphis and Charleston Railroad Company, had no authority to enter into the submission on behalf of said company. We think * * * the appearance of the appellees before the arbitrators, by their agents and counsel without objection to the reference, amounts to a ratification of the act of the agent, and estops them from making any objection to the submission after the award was made. Where the principal, upon a full knowledge of all the circumstances of the case, deliberately ratifies the acts, doings or omissions of his agent, he will be bound thereby as fully, to all intents and purposes, as if he had originally given him direct authority in the premises, to the extent which such acts, doings or omissions reach. Story on Agency, 283, § 239.

At common law, however, there is a distinction between the ratification of acts which are void and the ratification of those which are voidable. In the former case, the ratification is inoperative for any purpose whatever; in the latter, full validity is given to the acts. Acts which are illegal, immoral or against public policy fall within the former class. For, in such cases, the original contracts or acts being void, ought not to be allowed to acquire any validity from their being subsequently confirmed; since the same noxious qualities adhere to the ratification as existed in the original transaction. But whatever may be the force of this distinction in the former class of cases, properly understood, it is not applicable to cases of agency, where a party

assumes to act, not for himself but for another, without any authority whatsoever, or by any excess of the authority delegated to him, in cases where the principal may lawfully do the act. In all such cases, if the principal subsequently ratifies the act, he is bound by it, whether it be for his detriment or for his advantage. And a ratification once deliberately made, with full knowledge of all the material circumstances, cannot be recalled. Story on Agency, § 242.

As the corporation may lawfully be a party to a submission to arbitration, and as this can be effected only through an agent, it follows that the submission of the agent, although it may be in excess of authority, may be ratified by the corporation, as well by its acts as by express confirmation. And this we think was done by its appearance before the arbitrators by its agent and attorney, without objection to the authority of the arbitrators. This conduct and act on the part of the railroad company was a recognition of the authority of the arbitrators, and amounted to a ratification thereof. * * *

2. REQUISITES OF A RATIFICATION

(1) *Time Within Which Unauthorized Act is Ratifiable*

The principal's ratification must be made within a reasonable time after he learns of the act, and before the third party has withdrawn from it.

Where the agent has acted for a disclosed principal without authority, the resultant "contract" is of course no contract at all, for lack of necessary parties. The agent is not a party, since he did not act as such; the principal is not a party, since it is not his act, either in person or through an authorized agent. Consequently the undertaking of the third party is regarded as a mere offer, which of course may be withdrawn at any time before acceptance. As an offer, it terminates with the lapse of a reasonable time. What constitutes a reasonable time is determined largely by the nature of the subject matter dealt with. If it is an ar-

ticle of rapidly fluctuating value, ratification to operate as acceptance must be made much earlier than in the case of land or other subject matter of relatively stable value.

MASONIC TEMPLE, INC. v. EBERT.

Supreme Court of South Carolina, 1942. 199 S.C. 5, 18 S.E.2d 584.

[Defendant, R. E. Ebert, signed a contract to buy from the Masonic Temple, a corporation, a lot and building for \$27,000, paying \$1,300 down. The contract was executed on behalf of the corporation by its president, but could not bind the corporation until authorized by a two-thirds vote of the stockholders. Before the special meeting of the stockholders could be held, Ebert changed his mind about the deal and notified the corporation that he would not go through with the deal. With knowledge of this repudiation, the stockholders at a meeting duly called, ratified the contract of sale. A deed was thereafter executed and tendered to the defendant. He refused to accept it and stopped payment on the \$1,300 check. On June 14, 1939, this action was commenced by Masonic Temple, Inc., for specific performance of the contract.]

E. H. HENDERSON, Acting Associate Justice. * * * First,
Was there a binding contract?

When the contract was executed on January 12, 1939, it had not been authorized by the stockholders of the corporation. Section 7705 of the Code provides that a corporation such as this one, with the consent of the holders of two-thirds of the total number of shares outstanding, may sell all or substantially all of its property, and that before such sale the consent shall be obtained at a meeting of the stockholders.

To constitute a valid contract of sale in the circumstances here the consent of the stockholders was necessary. Until that consent was given, the signing of the contract by Ebert was only in the nature of an offer, which could be made effective by the acceptance of the stockholders. It is clear, in the ordinary case, that an offer may be withdrawn at any time before its acceptance, by notice given to that effect to the other party. So here, we think, at any time before the assent of the stockholders, the

defendant had the legal right to withdraw his offer by properly notifying the plaintiff corporation of his intention to do so.
* * *

Many authorities hold that prior to ratification by the principal, the other party to the contract has a right to withdraw.

In Fletcher's Cyclopedic of the Law of Private Corporations, Volume 2, Section 765, we find this statement: "It has been held in England, and there is dictum to the same effect in this country in some of the cases, that where a person assumes to enter into a contract for another without authority, the other party to the contract cannot withdraw so as to prevent a subsequent ratification by the person for whom the pretended agent acts. But this view is contrary to the settled principles of law and of the weight of authority. Until the principal ratifies the contract there is no mutuality of consideration for the other party's promise, and it follows that he may withdraw at any time before the principal becomes bound. A corporation, therefore, cannot by ratification of a contract made by an officer or agent without authority, render it binding on the other party if the latter has withdrawn and given notice thereof, before the ratification."

At 2 C.J.S., Agency, § 64, page 1142, it is said: "The general rule, however, is that until ratification the third person is free to withdraw from the contract, and if he does not do so the principal's ratification cures the defect in authority and the third person becomes thereafter bound as though the authority had been previously conferred, and he cannot thereafter withdraw except on grounds entitling him to a rescission. At all events, under the general rule stated if before the principal elects whether he will ratify, the other party signifies his intention not to be bound, there can be no ratification." * * *

In Restatement of the Law of Agency, Volume 1, page 213, it is said:

"To constitute ratification, the affirmance of a transaction must be before the third person has manifested his withdrawal from it either to the purported principal or to the agent, and before the offer of agreement has otherwise terminated or been discharged.

"Comment:

"a. Withdrawal by third person. Until affirmance, the relationship of the third person to the purported principal is similar to that of an offeror and an offeree. Before such time, therefore, the third person is free to withdraw either because he discovers that the principal has not authorized the transaction or for any other reason. This is so although the agent has not represented that he is authorized, and although the other party has contracted with the agent that he will not withdraw." * * *

The resolution of the stockholders was passed on January 24, 1939, and so we come to the question, Did the defendant give notice of withdrawal before that time?

The letter which defendant wrote on January 21, 1939, is as follows:

"Referring to our contract whereby you were to sell me the Masonic Temple Building. I am anxious to have you cancel this contract for me, owing to it having less income than I understood it had.

"I will be happy to reimburse the Masonic Temple, Inc., for any expenses it may have had in connection with this contract."

This letter, we think, expressed the unwillingness of the defendant to proceed further with the transaction. It is clear that the law does not require a notice of withdrawal of an offer to be in any particular form. It is not necessary that the words "revoke" or "withdraw" be used. * * *

[Reversed.]

(2) Principal Must be Disclosed

An undisclosed principal cannot ratify an unauthorized act of his agent, although a partially disclosed principal may do so.

Since the effect of ratification is to confirm the act as done, it is essential in order to have an act of agency that the act ratified must have been done by the assumed agent as agent and in behalf of a principal. If the act was done by the agent as principal, assuming to act in his own name alone, it cannot be ratified. It

is not necessary, however, that the principal be named or identified.

WILLIAMS v. STEARNS et al.

Supreme Court of Ohio, 1898. 59 Ohio St. 28, 51 N.E. 439.

[Action by Williams against Stearns & Hoover to recover for materials sold and delivered. Defendants were engaged as contractors in constructing the Columbus & Short Line Railroad. It appeared from the evidence that one Harmon was purchasing agent for the defendants, and that one Brooks was in their employ, in connection with and under Harmon, "to solicit lumber and timber for defendants in the construction of the said railway, and to draw written orders and bills in favor of the sellers of such lumber and ties upon Harmon for his acceptance and payment thereof"; that Harmon and Brooks came to the plaintiff and represented that they had a contract with the defendants to furnish material for the construction of the railroad, and Harmon made arrangements with plaintiff to sell him material on his own credit. It appears further that defendants, Stearns & Hoover, have paid their agent Harmon for the materials furnished by the plaintiff, although plaintiff has never received any payment therefor. It is the theory of plaintiff's suit that defendants are liable for the act of their agent on the ground that they have ratified his unauthorized act by the retention of the materials plaintiff furnished.]

SHAUCK, J. * * * The error in treating the transactions testified to by these witnesses as ratifications is obvious. There can be no ratification by an alleged principal unless authority to represent him has been assumed by the alleged agent. It is of the essence of ratification that the principal confirms and adopts as his own an act done without his previous authority. In the transaction testified to by these witnesses, Harmon and Brooks did not assume to act as agents for the defendants. To the contrary, their representation was that they were purchasing materials on their own account to fill their contract with the defendants. * * *

[The judgment below for the defendant will be affirmed.]

(3) *Knowledge of the Facts by the Principal Essential to Ratification*

The principal must have had full knowledge of the material facts about the act, or an opportunity of such knowledge so as to be chargeable with it, prior to his ratification.

BOHANAN v. BOSTON & M. R. R.

Supreme Court of New Hampshire, 1901. 70 N.H. 526, 49 A. 103.

The plaintiff's evidence tended to prove that he was injured in 1896, while working for the defendants, and released them from liability on account of his injury, in consideration of the promise of John H. Brown, their claim agent, that they would give him \$500 and furnish him steady employment during good behavior. They paid the money, and furnished him some work for two or three years, but have failed to give him steady employment. Brown told the plaintiff on the day of the settlement that he was authorized to make it, and talked in regard to it with one Mooney, who was employed by the defendants to hire the train men and arrange the running of the trains on the Concord division of their road. Later, the plaintiff complained to Mooney that the defendants were not doing as they agreed by him, and Mooney said he would see that the plaintiff had what belonged to him, and for a short time thereafter he was given steady work. A nonsuit was ordered at the close of the plaintiff's evidence, and he excepted.

YOUNG, J. The contract of an agent binds his principal only (1) when he authorizes his agent to make it, (2) when he gives the person dealing with his agent reason to believe that he has authorized it, and (3) when he ratifies it.

The testimony of the plaintiff's witnesses as to what Brown said respecting his authority when he made this settlement was inadmissible to prove that he was authorized to make it; for an agent's authority to make a particular contract cannot be proved by showing that he said he was authorized to make it; so there was no direct evidence of Brown's authority to act for the defendants. The only facts shown which tended to prove that

he had such authority were their holding him out as their claim agent, and recognizing this settlement so far as to pay the money he promised, and to furnish work for a time. Although these facts tend to prove that he was authorized to promise money and work for a limited time in settlement of such claims, they have no tendency to prove that he was authorized to promise anything else; * * *

There is no evidence that the plaintiff had a right to believe that Brown was authorized to make this settlement; for the only thing the defendants are shown to have done which tended to prove that Brown had any authority to act for them was to hold him out as their claim agent. Giving this fact the construction claimed for it by the plaintiff, Brown was their general agent to settle claims. The duties of a claim agent are not prescribed by law, and it is not a matter of common knowledge that they are intrusted with greater authority than other general agents. Such agents are only clothed, as a matter of law, with authority to employ the usual and ordinary means of accomplishing that for which the agency was created. * * *

There is no evidence that the defendants have ratified this settlement. Paying the money Brown promised, and furnishing a part of the work, did not amount to a ratification, unless they knew, or ought to have known, when they did so, that Brown's promise to give the plaintiff steady employment constituted a part of the consideration for his settlement; for a principal only ratifies such of the unauthorized acts of his agents as he adopts with a knowledge of all the facts essential to an understanding of his rights. *Gould v. Blodgett*, 61 N.H. 115, 120; *McDonald v. Insurance Co.*, 68 N.H. 4, 38 A. 500. There is no evidence of such knowledge here; for, excepting Brown, Mooney is the only one of their servants who is shown to have known of the settlement. The knowledge of an agent is the knowledge of his principal in regard to such matters only as come within the scope of the agent's employment. It follows that the defendants are not charged with Mooney's knowledge, unless it was a part of his duty to settle such claims. The only evidence respecting his duties was the testimony that he employed the help and attended to running the trains on the Concord division of the defendants' railroad. The fact that he performed these duties, has no tendency to prove that settling claims was any part of

his business, for it is neither an incident of the business of hiring help nor of running trains; nor is it a matter of common knowledge that an agent for these purposes usually has such authority. It is clear that Mooney's promise to give the plaintiff what belonged to him is not competent evidence of a ratification of this settlement unless there was other evidence from which the jury could find that he was authorized to employ men for life; for ordinarily an agent cannot ratify a contract he could not make. The only evidence respecting Mooney's authority to hire help was the fact that he hired them for the Concord division of the defendants' railroad. Giving this evidence the construction most favorable for the plaintiff, Mooney was their general agent to hire help, and clothed with authority to make such contracts of employment as railroad corporations usually and ordinarily make with their employés. But this will not help the plaintiff, for there is no evidence that such corporations ever employ servants for life.

(4) *Principal Cannot Ratify an Act Which He Had No Power to Do Originally*

To be capable of ratification, the act which the agent purported to do for the principal must be one which the principal is capable of performing both at the time when the act was done for him by the agent and at the time he seeks to ratify. If the principal could not act at either time, he cannot ratify.

ZOTTMAN v. CITY AND COUNTY OF SAN FRANCISCO.

Supreme Court of California, 1862. 20 Cal. 96, 81 Am.Dec. 96.

[Action against the city of San Francisco upon a contract alleged to have been made with it. It appeared that the council of the city had authorized certain improvements to be made under a contract with the plaintiff. After the work was started, it was discovered that changes were necessary involving extra expense, and a special committee, appointed to look after the work, together with other city officials, directed the changes to be made. These changes were known to all the members of

the legislative body of the city and were a matter of general approval. They did not, however, take any formal action upon it. The city paid the bill for the original contract but now refuses to pay for the "extras." At the trial the defendant had judgment.]

FIELD, C. J. [After deciding that the authority to make such contracts was vested in the legislative body of the city, and that it could make such contracts only by ordinances:] Individual members of the common council were not invested by the charter with any power to improve the city property, and any directions given or contracts made by them upon the subject, had the same and no greater validity than like directions given and like contracts made by any other residents of the city assuming to act for the corporation. And if individual members could not thus make any valid contract originally, they could not by any subsequent approval or conduct impart validity to such contract. But we go further than this; the common council even could not by any subsequent action give validity to a contract thus made. The mode in which alone they could bind the corporation by a contract for the improvement of city property was prescribed by the charter, and no validity could be given by them to a contract made in any other manner. The rule is general and applies to the corporate authorities of all municipal bodies; where the mode in which their power on any given subject can be exercised is prescribed by their charter, the mode must be followed. The mode in such cases constitutes the measure of the power. Thus, where authority is conferred to sell property, with a clause that the sale shall be made at public auction, the mode prescribed is essential to the validity of the sale; indeed there is no power to sell in any other way. Aside from the mode designated there is a want of all power on the subject. This is too obvious to require argument, and so are all the adjudications.

As a necessary consequence flowing from these views, a contract not made in the prescribed mode cannot be affirmed and ratified in disregard of that mode by any subsequent action of the corporate authorities, and a liability be thereby fastened upon the corporation. Ratification is equivalent to a previous authority; it operates upon the contract in the same manner as though the authority to make the contract had existed originally.

The power to ratify, therefore, necessarily supposes the power to make the contract in the first instances; and a power to ratify in a given mode supposes the power to contract in the same way. Therefore, where the charter of a city authorizes a sale of city property only at public auction, a sale not thus made is from its very nature incapable of ratification, because it could not have been otherwise made originally. So where the charter authorizes a contract for work to be given only to the lowest bidder, after notice of a contemplated work in the public journals, a contract made in any other way—that is, given to any other person than such lowest bidder—cannot be subsequently affirmed. Were this not so, the corporate authorities would be able to do retroactively what they are prohibited from doing originally. We had occasion, in the case of *McCracken v. City of San Francisco* [16 Cal. 619], to give to this subject great consideration, and we there held, that where authority to do a particular act can only be exercised in a particular form or mode, the ratification must follow such form or mode, and that a ratification can only be made when the principal possesses at the time the power to do the act ratified.

* * *

"By the charter the power is limited and it is a familiar rule that corporations can only bind themselves by contracts they are expressly or impliedly authorized to make. It may sometimes seem a hardship upon a contractor that all compensation for work done, etc., should be denied him; but it should be remembered that he, no less than the officers of the corporation, when he deals in a matter expressly provided for in the charter, is bound to see to it that the charter is complied with. If he neglect this, or choose to take the hazard, he is a mere volunteer, and suffers only what he ought to have anticipated. If the statute forbids the contract which he has made, he knows it, or ought to know it, before he places his money or services at hazard. * * * An individual having power to make a contract may ratify or affirm it, when made by one who without authority assumes to be his agent, but if the individual have himself no such power, he can no more bind himself retroactively to its performance by affirmation or ratification than he could have done so prospectively in the first instance. * * *

Judgment affirmed.

SECTION 4.—PRINCIPAL'S LIABILITY IN TORT—SCOPE OF EMPLOYMENT

1. IN GENERAL.

The principal is liable for wrongs done third parties by the agent so long as the agent was at the time acting within the scope of his employment.

The tests of scope of employment are: Motivation and Deviation.

(1) Motivation: An act is not within the scope of employment if it is done solely to further the private interests of the agent or servant. Where there is a double motive, to serve partly the master's interests and partly the servant's interests, the act may still be within the employment.

(2) Deviation: The act must have a reasonable relation to the authorized area of service, both in time, space, and authorized duty.

The line of demarcation between liability and nonliability of the master for the wrongful acts of his servant resulting in harm to third parties, is whether the servant was at the time of the act, inside or outside the scope of his employment. If the latter, the third party is limited to his action against the servant alone, and the master is not liable. If the former, he has his remedy against both the servant and the master.

The difficulty in the cases lies in determining the limits of scope of employment. It may be said with some degree of accuracy however, that where two factors are present, liability is imposed on the master; but where either of the two factors is missing, such liability is not imposed. These factors are: (1) Motivation, and (2) deviation. If at the time of the act, the servant's intention was solely to further some private purpose of his own, he was not in the employment; but if to further his master's business, he may have been. Thus where the driver of a wagon struck at a boy stealing a ride, causing him to lose his grip and fall, the court held that it was for the jury to determine the driver's intention. "If his act in striking the boy was to remove him by force from the wagon, it would be the act of his employer for which the latter would be responsible. If on the other hand, the purpose

of the driver was not to leave the wagon, but to inflict punishment on him to gratify the ill will of the driver, the employer is not responsible for the tortious act of the servant."

The deviation test is more difficult to state. The general idea behind it is, however, that if at the time of the wrongful act the servant was so far removed, either in time or space or character of act done, from the kind of acts he was authorized to do, he has deviated so far from the authorized area of service as to make clear a departure, whether temporary or permanent, from the scope of employment. A few illustrations will make this clear. Suppose that P tells A to drive his truck from New York to Jersey City, a matter of three miles. A drives to Jersey City by way of Albany, a hundred miles north. In the neighborhood of Albany, A negligently runs over T. Clearly the employer, P, would not be liable. A has departed from the scope of his employment. Or suppose that A is employed as bookkeeper in a garage. While all the drivers are out, a call for a cab comes in and A takes it upon himself to drive the cab, causing injury to third parties. Here A is motivated solely by an intention to serve his employer's interests, yet he is not in the employment, for driving a car is an act having no relation to his authorized duty of keeping books.

These principles are applied in the cases following:

STAPLES v. SCHMID et al.

Supreme Court of Rhode Island, 1893. 18 R.I. 224, 26 A. 193, 19 L.R.A. 824.

DOUGLAS, J. The jury have substantially found in this case that the defendants' salesman, erroneously suspecting the plaintiff of having stolen a package of spoons from the store, which was in his charge, detained her, sent for a police officer, and caused her to be sent to the police station, and there searched, and they assessed the damages to the plaintiff in the sum of \$750. The defendants bring their petition for a new trial, alleging that the verdict is against the evidence that, if the facts were as found, the defendants are not liable and that the damages are excessive.

The questions of law involved are raised by exceptions to the refusal of the presiding judge to rule as requested by the defendants, and by exceptions to the charge as given. The proposition upon which these exceptions are based, and which the defendants contend is established by the cases they cite, is that, as a matter of law, it is not within the scope of the employment of a salesman left in charge of a store to cause the arrest and search of a person whom he believes to have stolen property from his custody.

The general rule defining the liability of a master for the acts of his servant is thus laid down in *Wood on Master and Servant*, § 279: "For all acts done by the servant under the express orders or direction of the master, as well as for all acts done in the execution of his master's business within the scope of his employment, the master is responsible, but when the act is not within the scope of his employment, or in obedience to the master's orders, it is the act of the servant, and not of the master, and the servant alone is responsible therefor." The principle of the rule is stated by Andrews, J., in *Rounds v. Railroad Co.*, 64 N.Y. 129, 21 Am.Rep. 597. * * *

It is not contended that this general rule is not settled by reason and authority, but the defendants say that the acts here complained of were not within the scope of their agent's employment. It is obvious that in most cases the question is one of fact. What are the limitations of an agent's or a servant's authority depends generally upon the things he is to do, the object he is set to accomplish, the degree of discretion which the position where he is placed and the exigencies of the occasion reasonably call for. * * *

Two principles seem to be recognized by the [authorities on this question]: First, that when a servant not especially appointed to protect property arrests a person whom he supposes to have stolen his master's goods, the servant must be presumed to have acted in pursuance of his duty as a good citizen, and not in the scope of his employment as a servant. * * * Second, that [the law will not infer] that a master has authorized his servant to do an act which he could not lawfully do himself in the circumstances supposed by the servant to exist. * * *

It remains to apply these principles to the case at bar. The servant in this case was left with an assistant in charge of his master's store. His ordinary duties undoubtedly were to show goods, and to sell them to customers. It was, however, equally his duty to protect his master's property from pilfering. The acts complained of were evidently done with that intention. *The arrest was for the purpose of searching for and recovering the master's property, not with the object of punishing crime against the public.* The establishment was not a railroad station where the multiplicity of employees confines each one to a narrow round of duties, where special officers are stationed to preserve order and detain criminals, nor a large dry goods emporium, where detectives and watchmen are employed to guard against thieves. *The servant here was salesman and custodian in one.* Whatever the master might do in the protection of his property he expected his servant to do in his absence. If the servant had seen the plaintiff take up and secrete the package of spoons in question, and had allowed her to walk away with them unmolested, could anyone say that he had not been derelict in his duty to his master? If, in the performance of this duty, he mistook the occasion for it, or exceeded his powers, or employed an improper degree of compulsion, the mistake and the excess must be answered for by the master.

We conclude, therefore, that the directions asked by the defendants were rightly refused, and that the charge correctly stated the law of the case. * * *

LYKES BROS. S. S. CO. v. GRUBAUGH.

Circuit Court of Appeals of the United States, Fifth Circuit, 1942.
128 F.2d 387.

HUTCHESON, Circuit Judge. Brought by the steward of Lykes Bros. Steamship "Hybert", the suit was under the Jones Act, 46 U.S.C.A. § 688, for damages for injuries inflicted on him by the negligence of the chief engineer and an assistant engineer. The claim was that while the vessel was moored to the dock in Brooklyn, the plaintiff was unlawfully assaulted by the chief engineer and the first assistant engineer, acting in the scope of their authority as officers of the ship over plaintiff, that he sus-

tained damages as the result thereof, and that he is entitled to recover his actual damages and maintenance and cure. * * *

There was a further allegation; that he was notified that the chief engineer wished to see him; that he went to the chief engineer's door and the chief, without addressing him, opened the door and said, "I will show you who has authority aboard this vessel", and then began beating the plaintiff over the head and face; that when the chief engineer approached plaintiff he realized that the chief engineer was grossly intoxicated, and he tried to escape but the assistant engineer held plaintiff while the chief struck him. * * * The case then proceeding to trial, it appeared without dispute from the whole of the evidence that the moving cause of the fight was the resentment of the intoxicated chief engineer over the fact that plaintiff had, or the engineer believed he had, been circulating defamatory statements about him. This evidence, in addition to the testimony of defendants' witnesses consisted of a written statement of the occurrence made by the plaintiff in the office of defendant in New York just after the incident had occurred. Notwithstanding this state of the evidence, the court * * * submitted to the jury the issue of whether or not the occurrence was a purely personal row or grew out of, and occurred in, the conduct of the business of defendant. * * *

There was a verdict for plaintiff followed by judgment.

* * *

Taking the evidence however, most favorably for plaintiff, it did not make out a case and the court erred in refusing to instruct a verdict. Nothing more clearly shows the misconception under which the court was laboring in his determination that the case was one for the jury than the language he used in his charge in stating the plaintiff's contention and declaring that if that contention was made out, the defendant would be liable. "It is the plaintiff's contention here that they assailed him upon the idea that they didn't like the services of the steward; didn't like the way in which he deported himself; didn't think he was fit to be upon the boat and that he should not be, and they were attempting to run him off the boat, and that he was, to some extent, subject to their orders and directions and they had the power and authority to supervise him and that they took this mistaken way of supervising him, that is to say, to discipline him by actual

physical, corporeal punishment. If those things all be true, then the master would be liable for their action."

The law governing the responsibility of the master for an injury from a beating administered by one employee to another, as well stated in Medlin Milling Co. v. Boutwell, 104 Tex. 87, 133 S.W. 1042, 34 L.R.A.,N.S., 109, and Davis v. Green, 260 U.S. 349, 43 S.Ct. 123, 67 L.Ed. 299, is that under the doctrine of respondeat superior there is no liability for a wrongful assault committed by one employee on another unless the assault is committed, whether wisely or unwisely in furtherance of or in an attempt to further the master's business or in other words in connection with some act which an assaulter is authorized to do for the master. In any case where the act is merely a wanton and wilful act done to satisfy the temper or spite of the employee, the master is not liable. * * * The question is, was the superior attempting to exert that superiority on behalf of the master or was he exerting it in a private brawl, at the time the injury occurred. Tested by this rule, nothing in the evidence supports the theory upon which plaintiff recovered. * * *

The case stands upon the undisputed evidence as one of an assault made because of the engineer's personal resentment of the tales he believed the steward was carrying about him. Plaintiff does not deny, indeed he admits, that the engineer was angry with him because of his supposed tale telling. He merely denies that he had told tales and claimed that the engineer wrongly accused him. Plaintiff's effort to show that notwithstanding the real basis for the trouble was a personal grievance, the master is yet liable because in the course of the row the engineer loudly asserted his authority, will not avail him. * * *

Reversed.

ILLINOIS CENT. R. CO. v. LATHAM.

Supreme Court of Mississippi, 1894. 72 Miss. 32, 16 So. 757.

WHITFIELD, J. Accepting the plaintiff's testimony as true, it appears that he was riding on top of the coach to avoid the payment of his fare, and did not go back to the caboose because he

feared the conductor would say something. He got on at Memphis to go to Sardis. The fare was \$1.50. The brakeman did not demand \$1.50, but 50 cents; he did not eject him when the demand for 50 cents was first made and declined, and not until the transit was nearly terminated. Under the rules introduced by plaintiff, and as explained by Homer Williams, a witness for plaintiff, it would have been the duty of the brakeman to report to the conductor the presence of plaintiff on the train, and act, as to his ejection, under the conductor's orders. The brakeman made no report to the conductor whatever, but acted independently of him. Failing to get the money,—the 50 cents—he cursed the plaintiff and shoved him off the moving train. Surely, in no just and reasonable view can it be held that in the acts of the brakeman, thus done, was he acting in his master's business, or with intent to perform any duty due to the master. He was not demanding "fare," but money to put in his pocket. He did not eject him under the orders of the conductor, nor when—aside from any orders of the conductor—he first discovered him, nor at the next station. He was plainly attempting to extort money for his private use. * * *

The question here is whether the brakeman, in doing what he did, as he did it, was acting for the company or in the accomplishment solely of his own independent, wilful, malicious, and wicked purposes, using his authority to eject trespassers, if any there was, as a mere cover under which to extort money from appellee, not for fare, but for his pocket? The case of Kansas City Ft. S. & G. R. Co. v. Kelly in 14 P. 173 is clearly a case where the injured boy was ejected from the train as a trespasser, simply to get him off, as being improperly on the train, in execution of what the court held the implied duty of the brakeman to eject trespassers. Manifestly, in that case the brakeman acted in discharge of what he deemed a duty to the company. There was no hint in that case of any act done by the brakeman for his own private benefit, or to gratify even private malice. * * *

It is true that ordinarily the question whether the brakeman's act was within the line of his duty, done for the master and in his business, is one of fact, for the jury, since ordinarily there is conflict in the evidence. But in this case, on the plaintiff's own testimony, the court should have granted the [motion for a directed verdict for the defendant railroad company. Manifestly

in this case the brakeman was acting outside the scope of his employment.]

Reversed.

2. ASSAULTS COMMITTED BY THE AGENT

SINGER SEWING MACH. CO. v. PHIPPS.

Appellate Court of Indiana, 1911. 49 Ind.App. 116, 94 N.E. 793.

IBACH, J. Appellee, Nellie Phipps, brought this action in the Floyd circuit court to recover damages for an alleged assault and battery committed upon her by appellant's agent, Louis J. Beach.

The facts briefly are as follows: Susan Read, the mother of appellee, leased a sewing machine from the appellant company under a written agreement of conditional sale. This agreement gave the appellant the right, if default in payment was made, to regain possession of the machine, without recourse to law. The evidence shows that Mrs. Read made default in payment, and that she kept her outer door locked to prevent the sewing machine agent entering to take the machine. The agent kept watch of the premises, and when one Kraft, the probation officer of Floyd county, entered her house to see appellee, Beach and another agent of appellant entered. To prevent them from removing the machine, appellee seated herself upon it. The assault and battery complained of was made, as alleged, by appellant's agent, Beach, tipping the machine and raising one end of it from the floor, thus throwing appellee to the floor; and, in consequence of the injuries suffered, after three weeks she gave premature birth to a child. [The jury found for the plaintiff and assessed her damages in the sum of \$1,000. Defendant appeals, denying liability on the ground that their agent acted outside the scope of his authority in committing the assault.]

In the case before us the agent was authorized to enter the home of appellee and take possession of the machine in question; the appellant thereby permitted him to determine the manner and method of obtaining such possession, and is therefore responsible for his misjudgment or misconduct; and, if he used such force as to injure appellee in carrying out the object or regaining the ma-

chine in question, that being the purpose of going to her house, the result of such conduct will fall upon appellant. * * *

[Judgment for plaintiff affirmed.]

3. DEVIATIONS FROM THE COURSE OF THE EMPLOYMENT

FLEISCHNER v. DURGIN

Supreme Judicial Court of Massachusetts, 1911.
207 Mass. 435, 93 N.E. 801, 35 L.R.A.,N.S., 79, 20 Ann.Cas. 1291.

RUGG, J. The plaintiff while in the exercise of due care and traveling on Dartmouth street opposite the Public Library in Boston was injured by the negligence of one Freeman, who was driving the defendant's motorcar. Freeman was not in the general employ of the defendant, but on the day in question had been asked by him to drive the car from the Stevens garage in the town of Brookline to the shop of one Burlingame, also in Brookline and less than a mile away, for some repair. Later in the day Freeman took the car, drove first to Coolidge Corner, a square in Brookline, not on the way to the Burlingame shop, where he had lunch. Then with a friend he drove the car about six miles further out of the way from the garage to the Burlingame shop to a shop in Boston for the purpose of getting a chain for his own uses. He had started to return to Brookline and was bound for the Burlingame shop when the accident occurred. The defendant gave no directions to go to Coolidge Corner or to Boston, and this ride was taken without his knowledge. Freeman had worked at the Stevens garage where the defendant kept his motorcar, and once before had driven it to Boston, but under what circumstances does not appear.

The principles which govern the rights of the parties are settled. The master is liable for the act of a servant in charge of his vehicle when the latter is acting in the main with the master's express or implied authority, upon his business and in the course of the employment for the purpose of doing the work for which he is engaged. The master is not liable if the servant has abandoned his obligations, and is doing something not in compliance with the express or implied authority given, and is not act-

ing in pursuance of the general purpose of his occupation or in connection with the doing of the master's work. Under this rule the employer has been held responsible for wrongs done to third persons by his driver during incidental departures from the scope of the authority conferred by the employment and upon comparatively insignificant deviations from direct routes of travel, but within the general penumbra of the duty for which he is engaged. *Hayes v. Wilkins*, 194 Mass. 223, 80 N.E. 449, 9 L.R.A., N.S., 1033, 120 Am.St.Rep. 549.

The employment of Freeman was limited to a specific and short trip within a town. He took the car several miles out of the way, which was six or seven times as far as he had a right to go, to a crowded part of a large city on an errand wholly of his own, and had only just commenced to return at the time the act occurred for which damages are sought in this action. He was acting in disregard of his instructions, and wholly outside his employment, and for a purpose having no relation even remote to the business of the master. The extent of the excursion which he undertook on his own account was so disproportionate to the length of the route he was authorized to go that it cannot be minimized to a deviation. It was in fact the chief journey. There is nothing to indicate that the defendant had any hint or ground for suspicion of this unwarranted use of his property. Under such circumstances he cannot be held liable. *McCarthy v. Timmins*, 178 Mass. 378, 59 N.E. 1038, 86 Am.St.Rep. 490; *Story v. Ashton*, L.R. 4 Q.B. 476; *Mitchell v. Crassweller*, 13 C.B. 237.

Exceptions overruled.

RILEY v. STANDARD OIL CO. OF NEW YORK.

Court of Appeals of New York, 1921.
231 N.Y. 301, 132 N.E. 97, 22 A.L.R. 1382.

ANDREWS, J. Driving directly towards his master's mill, his master's truck loaded with his master's goods for which his master had sent him, his only purpose to deliver them as his master had commanded, with no independent object of his own in mind, Million, a chauffeur employed by the defendant, ran over the plaintiff, negligently, as the jury have said with some evidence to support their finding. Therefore the complaint should not

have been dismissed, unless we can say as a matter of law that at the moment of the accident this chauffeur was not engaged in the defendant's business. We reach no such conclusion.

There could be no debate on this subject were not the essential facts obscured or modified by other circumstances. It appears, however, that the chauffeur had been ordered to go from the mill to the freight yards of the Long Island Railroad, about 2½ miles away, obtain there some barrels of paint, and return at once. After the truck was loaded, Million discovered some waste pieces of wood. He threw them on the truck, and on leaving the yards turned, not towards the mill, but in the opposite direction. Four blocks away was the house of a sister and there he left the wood. This errand served no purpose of the defendant, nor did the defendant have knowledge of or consent to the act of the chauffeur. Million then started to return to the mill. His course would lead him back past the entrance to the yards. Before he reached this entrance, and when he had gone but a short distance from his sister's house, the accident occurred.

A master is liable for the result of a servant's negligence when the servant is acting in his business; when he still is engaged in the course of his employment. It is not the rule itself but its application that ever causes a doubt. The servant may be acting for himself. He may be engaged in an independent errand of his own. * * *

No formula can be stated that will enable us to solve the problem whether at a particular moment a particular servant is engaged in his master's business. We recognize that the precise facts before the court will vary the result. We realize that differences of degree may produce unlike effects. But, whatever the facts, the answer depends upon a consideration of what the servant was doing, and why, when, where, and how he was doing it.

A servant may be "going on a frolic of his own, without being at all on his master's business." He may be so distant from the proper scene of his labor, or he may have left his work for such a length of time, as to evidence a relinquishment of his employment. Or the circumstances may have a more doubtful meaning. That the servant is where he would not be had he obeyed his master's orders in itself is immaterial, except as it may tend to show

a permanent or a temporary abandonment of his master's service. Should there be such a temporary abandonment the master again becomes liable for the servant's acts when the latter once more begins to act in his business. Such a reentry is not affected merely by the mental attitude of the servant. There must be that attitude coupled with a reasonable connection in time and space with the work in which he should be engaged. No hard and fast rule on the subject either of space or time can be applied. It cannot be said of a servant in charge of his master's vehicle who temporarily abandons his line of travel for a purpose of his own that he again becomes a servant only when he reaches a point on his route which he necessarily would have passed had he obeyed his orders. He may choose a different way back. Doubtless this circumstance may be considered in connection with the other facts involved. It is not controlling.

We are not called upon to decide whether the defendant might not have been responsible had this accident occurred while Million was on his way to his sister's house. That would depend on whether this trip is to be regarded as a new and independent journey on his own business, distinct from that of his master, * * * or as a mere deviation from the general route from the mill and back. Considering the short distance and the little time involved, considering that the truck when it left the yards was loaded with the defendant's goods for delivery to its mill and that it was the general purpose of Million to return there, it is quite possible a question of fact would be presented to be decided by a jury. At least, however, with the wood delivered, with the journey back to the mill begun, at some point in the route Million again engaged in the defendant's business. That point, in view of all the circumstances, we think he had reached. * * *

4. DISTINCTION BETWEEN AGENTS AND INDEPENDENT CONTRACTORS

If a result alone is contracted for, no control being retained as to the means by which it is to be accomplished, the relationship is not that of principal and agent, but owner and independent contractor.

Where the relationship is that of independent contractor, the agents of such contractor are his agents alone, and not the sub-agents of the owner; and for their negligent acts the owner is in general not liable.

EXCEPTIONS:

- (1) Where the owner causes the precise act to be done which causes the injury, either by (a) personally interfering with the work and directing that it be done in a certain way, or by (b) contracting originally that it be done in the way which causes the injury.
- (2) Where the owner employs as contractor a notoriously unsafe and untrustworthy person, and the injury is occasioned by his careless execution of his contract.
- (3) Where the owner contracts for a thing to be done which is unlawful, or which will create a public nuisance.
- (4) Where the owner entrusts the contractor with an inherently dangerous instrumentality.

The test as to whether the contract is one of agency or independent contract seems to be whether the employer retained control of the means by which the result is to be obtained, or whether the result alone was contracted for. If the latter, it is a case of independent contract. If a tort is committed by an independent contractor, rather than by an agent, ordinarily the employer is not liable to the third person injured; although there may be circumstances, as referred to in the cases following, where even here there may be liability.

LAWRENCE v. SHIPMAN et al.

Superior Court of Hartford County, Connecticut, 1873. 39 Conn. 586.

SEYMOUR, J. * * * The plaintiffs were respectively tenants of the defendants, occupying a brick building called the Russ Place, which the defendants owned as trustees in fee, situate on the west side of Main street, in the city of Hartford. The plaintiffs aver that while they were thus occupying the tenement on the 13th day of July, 1869, and for several days next previous thereto, the defendants carelessly and negligently excavated and removed, and caused to be excavated and removed, the earth and foundation from under the south wall of said tenement, and

did thereby remove the necessary support of said wall, and on said day had negligently and carelessly made and caused to be made the excavation and removal aforesaid, without providing other necessary support of said wall, and had negligently omitted to shore up said wall as aforesaid, although warned by the plaintiffs of the danger, whereby the wall sank and fell and the whole building was demolished, and the plaintiffs' goods of great value were destroyed.

There is no serious conflict of testimony. Indeed most of the facts are agreed to. The relation of the parties to each other is as stated in the writ. One Duffy owned the premises south of and adjoining those of the defendants, and he had pulled down a tenement on his lot in order to rebuild. Neither building had a cellar. Duffy had made considerable progress in digging a cellar on his lot, when he had a communication with the defendants proposing that they should join him in building a party wall of stone under the south wall of the defendants' tenement. Duffy's proposition was favorably entertained, and resulted in a verbal contract with a builder and mason by trade, to remove the earth from under the south wall of the defendants' tenement and underpin it with stone. He was to furnish everything needed for the job. The stone structure was to be laid eight feet below the sidewalk and was to extend the depth of the defendants' building, and was to be two and a half feet in thickness, nine inches being on Duffy's land and one foot nine inches on the defendants' land. The price agreed on was \$500, one half to be paid by Mr. Duffy and one half by the defendants. The defendants and Duffy were the contracting parties on one side and the mason on the other. The defendants did not have, nor were they by the terms of the contract to have, any oversight or direction of the job. They relied on the skill and experience of the mason to do the work properly, carefully and according to his contract.

The contractor commenced his work about the 12th of July, undermining at first about nine feet of the defendants' wall and immediately began filling up the gap with stone. On the 13th he continued his stone work, but unfortunately and inadvisedly he undermined the wall at another place before the first gap was filled and thus weakened the foundation, so that at about half-past three o'clock in the afternoon of the 13th of July, the whole building tumbled into a mass of shapeless ruins. The occupants

barely escaped with their lives, saving none of their property.

* * *

The first question suggested is, whether this negligence of the mason can in law be imputed to the defendants. If he was their servant his carelessness is in law theirs. If, on the other hand, he was merely a contractor, acting as such in an independent business, they are not under the general rule of law liable, though they may even then under certain circumstances be held responsible. Whatever obscurity may heretofore have rested upon the distinction between servant and contractor, it is now established law that such a distinction exists, and the elements which distinguish the one from the other by the modern decisions have been determined with considerable approach to exactness and accuracy, though it must be admitted that in some instances the distinction is nice and difficult. In this case it is to be noticed:

1. That the mason was employed in a single transaction at a specified price for the job.
2. By the terms of the contract he was to accomplish a certain specified result, the choice of means and methods and details being left wholly to him.
3. The employment was of a mechanic in his regular business, recognized as a distinct trade, requiring skill and experience, and to which apprenticeships are served.
4. The contractor's duty was to conform himself to the terms of the contract, and he was not subject to the immediate direction and control of his employers.

These circumstances by all the authorities indicate a contractor in contradistinction from a mere servant, and the defendants cannot in my judgment be subjected for the negligence of the contractor, upon the basis of the relation of master and servant. But it was suggested in the argument that as the contractor was at work on the defendants' property, by their procurement and for their benefit, and being selected by them, natural justice requires that they should bear the consequences of his negligence rather than the plaintiffs, who are innocent sufferers, having had no agency whatever in the transaction which caused the loss.

These suggestions are not without a show of reason, and their force is fully admitted in the law as applicable to a certain class of cases.

1. If a contractor faithfully performs his contract, and a third person is injured by the contractor, in the course of its due performance, or by its result, the employer is liable, for he causes the precise act to be done which occasions the injury; but for negligences of the contractor, not done *under* the contract but in *violation* of it, the employer is in general not liable. It is not claimed here that the injury to the plaintiffs arose from the due *performance* of the contract. On the contrary, it resulted from the *breach* of the contract, by the contractor not doing his work with suitable care.

2. If I employ a contractor to do a job of work for me which in the progress of its execution obviously exposes others to unusual peril, I ought, I think, to be responsible upon the same principle as in the last case, for I cause acts to be done which naturally expose others to injury. The case now before me could not, however, I think, come under this head. The peril, whatever it was, was mainly to the defendants' own tenement, and cannot be treated, notwithstanding the unfortunate event, as one at all imminent to the plaintiffs.

3. If I employ as a contractor a person incompetent and untrustworthy, I may be liable for injuries done to third persons by his carelessness in the execution of his contract. This, too, has no application to the case before me. But the plaintiffs claim that the same principle is applicable to the employment of a person pecuniarily irresponsible, and evidence was received, subject to objection, that the contractor was destitute of property; and I am called upon to decide the effect of this fact. I am not prepared to say that this fact may not be of some weight where the work to be done is hazardous to others. If a person having an interest in a job which naturally exposes others to peril, should attempt to shield himself from responsibility by contracting with a bankrupt mechanic, I think the employers might be subjected for damages done by the contractor, but, as before stated, the work to be done by the contractor involved no peril in its usual performance, and I cannot hold the defendants liable under this claim. • • •

I therefore award that the defendants are not guilty in manner and form as alleged.

There are other cases than those mentioned in which the employer is liable for the negligence of his contractor, but they have no special application to the matter before me. I will barely allude to them. It has always been understood that if the negligence creates a nuisance the employer is liable. * * * So if the contract is to do an unlawful thing, the employer as well as the contractor is liable for the damage done in the execution of the contract. There was formerly a doubt whether the owner of real property could be protected from liability caused by work upon it by a contractor, but it is now settled that real and personal property stand upon the same footing in this respect. * * *

NEW ORLEANS, MOBILE & CHATTANOOGA R. CO. v.
HANNING.

Supreme Court of the United States, 1872. 15 Wall. 649, 21 L.Ed. 220.

[The defendant company entered into a contract with one Carvin for the construction of a wharf on the Mississippi river, Carvin to receive \$40 per 100 square feet of floor area, and to follow certain specifications. The company reserved the right to supervise the work and to control the manner of performing it. The plaintiff was injured by falling from the wharf during its construction and claimed that the accident was caused by the negligence of the defendants in leaving the wharf open to passersby in its dangerous condition. Judgment was for plaintiff below, and the defendant sues out a writ of error.]

Mr. Justice HUNT. * * * The rule extracted from the cases is this: the principal is liable for the acts and negligence of the agent in the course of his employment, although he did not authorize or did not know of the acts complained of. So long as he stands in the relation of principal or master to the wrongdoer, the owner is responsible for his acts. When he ceases to be such and the actor is himself the principal and master, not a servant or agent, he alone is responsible. Difficult questions arise in the application of this rule. Nice shades of distinction exist, and many of the cases are hard to be reconciled. Here the

general management and control of the work was reserved to the company. Its extent in many particulars was not prescribed. How and in what manner the wharf was to be built was not pointed out. That rebuilt was to be as good as new. The new to be of the best workmanship. This is quite indefinite and authorizes not only, but requires a great amount of care and direction on the part of the company. The submission of the whole work to the direction of the company's engineer is evidence, although not conclusive, that the company retain the management and control. The reservation of authority is both comprehensive and minute. The company have the general control, and it may prescribe where each pile shall go, where each plank shall be laid, where each stringer shall be put down, where each nail shall be driven. All the details are to be completed under their orders and according to their direction. The contractor undertakes in general terms to do the work well. The company reserve the power not only to direct what shall be done but how it shall be done. This is an important test of liability. * * *

[Judgment affirmed.]

CHAPTER 2

LIABILITY OF AGENT TO THIRD PARTY

Section

1. In Contract.
 2. Liability of Agent to Third Party—In Tort.
-

SECTION 1.—IN CONTRACT

(1) WHERE AGENT'S ACT IS UNAUTHORIZED

In all cases where an agent assumes to act for a named principal, he thereby impliedly warrants that he is the agent of the principal, that he is duly authorized to act as he has assumed to act, and that his principal has an actual legal existence.

Where a person assumes to contract with a third party on behalf of a named principal, he impliedly warrants to the third party that he has the authority so to contract. If he has not the authority, actual or apparent, so that the third party could not hold the principal, the third party may hold the agent, not on the contract, for he is not party thereto, but in damages for breach of the implied warranty. The measure of damages is the amount of profit which would have been made had the contract actually been made and performed.

It is immaterial whether the agent knew or did not know that he was unauthorized, so far as his contract liability for breach of warranty is concerned. Where he knew that he was exceeding his authority, his assumption to act is a fraud upon the third party, giving the latter an option to hold the agent in a tort action for deceit rather than the contract form of action for breach of warranty.

KROEGER v. PITCAIRN.

Supreme Court of Pennsylvania, 1882. 101 Pa. 311, 47 Am. Rep. 718.

[Pitcairn was a fire insurance agent and had written a policy for Kroeger. Kroeger kept petroleum on his premises,

which was forbidden by the terms of the policy, unless written consent was indorsed thereon. Kroeger called Pitcairn's attention to this clause and was assured by the latter that no written indorsement was required, where the amount kept was so small as that which Kroeger carried in stock. Kroeger therefore accepted the policy without the indorsement. A fire destroyed his stock, and in an action against the insurance company Kroeger was defeated because he had kept this petroleum without the written consent. He brought this action against Pitcairn to recover damages for the misrepresentation. Judgment for defendant below.]

STERRETT, J. * * * What was said and done by defendant, in the course of the transaction, amounted to more than a positive assurance that the accepted meaning of the policy was as represented by him. In effect, if not in substance, his declarations were tantamount to a proposition, on behalf of the company he assumed to represent, that if the insurance was effected it should be with the understanding that a barrel of carbon oil was included in and formed part of the insured stock of merchandise, without being specially mentioned in the policy. The plaintiff doubtless so regarded his declarations, and relying thereon, as the jury has found, accepted the policy on the terms proposed, and thus concluded, as he believed, a valid contract of insurance, authorizing him to keep in stock, as he had theretofore done, a small quantity of carbon oil. It was not until after the property was destroyed that he was undeceived. He then discovered, that in consequence of defendant having exceeded his authority, he was without remedy against the company. Has he any remedy against the defendant, by whose unauthorized act he was placed in this false position? We think he has. * * * As a general rule, "whenever a party undertakes to do any act as the agent of another, if he does not possess any authority from the principal therefor, or if he exceeds the authority delegated to him, he will be personally liable to the person with whom he is dealing. * * *" Story on Agency, 264. * * *

The cases in which agents have been adjudged liable personally have sometimes been classified as follows, viz.: (1) Where the agent makes a false representation of his authority with intent to deceive; (2) where, with knowledge of his want of

authority, but without intending any fraud, he assumes to act as though he were fully authorized; and (3) where he undertakes to act bona fide, believing he has authority, but in fact has none, as in the case of an agent acting under a forged power of attorney. As to cases fairly brought within either of the first two classes there cannot be any doubt as to the personal liability of the self constituted agent; and his liability may be enforced either by an action on the case for deceit, or by electing to treat him as principal. While the liability of agents, in cases belonging to the third class, has sometimes been doubted, the weight of authority appears to be that they are also liable.

* * *

Judgment reversed. * * *

SWEARINGEN et al. v. C. W. BULGER & SON.

Supreme Court of Arkansas, 1915. 117 Ark. 557, 176 S.W. 328.

Action by C. W. Bulger & Son against C. W. Swearingen, Hot Springs Baptist Church, and others. Judgment for defendant church, and judgment for plaintiff against defendants Swearingen and others, and they appeal. Reversed and remanded for new trial.

MCCULLOCH, C. J. Hot Springs Baptist Church (Incorporated), of the city of Hot Springs, Ark., decided to build a new church edifice in April, 1908, and through its pastor began negotiations with appellees, a firm of architects in the city of Dallas, Tex., for the preparation of plans and specifications. Appellants and certain other members of the church were appointed as a building committee, with authority to make contracts, but the authority was limited to that of forming plans and building a church not to cost exceeding the sum of \$50,000. The pastor of the church was ex officio a member of the committee and was the most active member; most of the negotiations with appellees being conducted through him. A contract was finally entered into with appellees for preparation of the plans and specifications; the compensation to be 3 per cent. on the estimated cost of the building, or \$1,500, payable in three equal installments, the first of which was paid. Appellees prepared

plans and specifications and delivered them to the committee, and this is an action to recover the sum of \$1,000, and interest thereon, balance due on the price agreed to be paid. Appellants, as members of the committee, and the church itself, were sued jointly. The church defended on the ground that it had given no authority to make a contract for the construction of a church in excess of the cost of the sum of \$50,000, and appellants defended on the ground that they made no contract to bind themselves individually, but acted only as agents of the church, and were not personally liable. The trial of the case resulted in a verdict in favor of the church but against appellants as members of the building committee, for the amount of the balance due under the contract.

[The sole question before us, therefore, is as to the liability of the appellants, the individual members of the building committee who signed the contract with appellees in the name of the church. The principle that an agent who has exceeded the limits of his authority so far that there may no liability attach to his principal will be personally liable to the third party with whom he dealt either for breath of an implied warranty of authority or in an action for deceit, is a familiar one.] We [have in the past] had occasion to lay down the law generally as to the personal liability of an agent who contracts in excess of the authority delegated to him by his principal. There are, however, many limitations upon that general rule, and one of them is that if the party with whom the agent deals has full knowledge of the lack of authority, and there is no express undertaking on the part of the agent to make himself personally liable, he does not become liable merely because of the fact that he exceeds his authority. The law on that subject is stated as follows:

"The above rules in respect to an agent's liability for entering into a contract on behalf of an assumed principal apply, however, only where the third party has acted in good faith and has been induced or misled into entering into the contract by the agent's express or implied representations as to authority. In order that such party may hold the agent liable for damages, it is necessary that he should have been bona fide ignorant of the extent of the agent's authority. If he knows, or has knowledge sufficient to put him on inquiry, of the facts and circum-

stances surrounding the agency, and he fails to make use of such knowledge or to make such inquiry, it cannot be said that he has been induced or misled into the contract by the agent's express or implied representations, and he cannot hold the agent responsible for any injury he may have suffered thereby, unless the agent has concealed or misrepresented material facts to his injury. Hence where an agent, at the time he enters into the contract, bona fide discloses to the other party all the facts and circumstances in the case, in reference to the authority which he claims to have, such party cannot say that he has been misled, so as to hold the agent liable for any damage he may have incurred." 2 Clark & Skyles on Agency, § 582.

There are many decisions on that subject, and the law is well settled. [Applying this limitation of the general doctrine, to the case before us, it appears very clear that under the evidence there can be no liability against the appellants as agents, for the reason that it is not disputed that Bulger & Son] appellees had full knowledge of the fact of the limitations upon the authority of the committee. * * * That being true, the committee was not personally liable, not having assumed any expressed personal liability in entering into the contract.
* * *

[Judgment reversed.]

(2) WHERE AGENT FAILED TO DISCLOSE PRINCIPAL

(a) *On Simple Contracts*

Where an agent fails to reveal to the third party with whom he is dealing the fact of his agency and the identity of his principal, he will himself be liable on the contract as a party thereto.

An agent who assumes to act as a principal, and who does not disclose the fact of his agency and the identity of his principal, may be held on the contract by the third party with whom he dealt. So much for the rights of the third party against the agent. We have already examined into the rights of the third party against the undisclosed principal; he may hold the undisclosed principal upon discovery, subject to the exceptions noted. In simple contracts (though not on contracts under seal and nego-

tiable instruments), parol evidence is admissible to prove that the contract executed by and in the name of the agent is the contract of the principal; and the principal may sue and be sued on the contract. The important thing to note here, however, is that the *agent* is not discharged. The third party to whom he represented himself as principal may hold him as such, and justly so, since the third party extended the credit to the agent alone. Of course, the fact that the third party has his election to proceed against the principal rather than the agent may free the agent from liability in case the third party takes this choice, but the only way in which the agent can make certain his freedom from personal liability is to disclose his agency and the name of his principal upon the contract which he signs. The proper form is to write the name of the principal by himself as agent.

(b) *On Contracts Under Seal and Negotiable Instruments*

Where an agent enters into a contract under seal, or signs a negotiable instrument, without disclosing his agency and the identity of his principal on the face of the contract, the agent is solely liable. No parol evidence is admissible to show that the contract was in reality that of an undisclosed principal, for this would vary the effect of the written instrument.

We have previously seen under the question of the rights of the third party against the undisclosed principal, that (1) the principal may not be held at all in the case of the instrument under seal; (2) that he may be held on the underlying contract though not on the instrument, in the case of a negotiable instrument signed in the agent's name alone. The question here is whether the *agent* may be held as party to the sealed contract or negotiable instrument where he has signed it as principal. The answer is the same on this either as to a sealed contract or negotiable instrument. Where he has not disclosed his representative capacity nor the name of the principal on the instrument, he is liable as party to it, and he may not show by parol evidence that the third party knew throughout the principal's identity and his intent to be the real party to the contract. Suppose that an engineer, charged by his employer to build a bridge, enters into a contract under seal for the purchase of land for the bridge site,

signing the contract in his own name. The engineer would himself be personally liable on the contract, and, if sued thereon, would be prevented from introducing any evidence that he had acted directly in compliance with his employer's orders and that the employer was the real buyer. It is similar with a negotiable instrument, such as a promissory note or bill of exchange; the agent who has signed such in his own name, without disclosing his principal thereon, will be personally liable for the payment of the instrument, even though he himself did not receive the borrowed money.

WILLIAMS v. ROBBINS et al.

Supreme Judicial Court of Massachusetts, 1860. 16 Gray, 77, 77 Am.Dec. 396.

[Action against Robbins and Winship, copartners, on a note reading:] "Four months after date I promise to pay to the order of Bartlett & Williams \$300 payable at Agawam Bank, Springfield, value received. A. Copeland, Ag't." [At the trial it was proved to have been given by Copeland as agent of the defendants. From judgment for the defendants, plaintiff appeals.]

HOAR, J. The most important question which this case presents is whether the note declared on can be considered the contract of the defendants, if it were conceded that Copeland had full authority to make it in their behalf, and that the consideration was exclusively received for their benefit. The rule is thus stated by Mr. Justice Story: "Where upon the face of the instrument the agent signs his own name only, without referring to any principal, there he will be held personally bound, although he is known to be or avowedly acts as agent." Story on Notes, § 68. But "if it can upon the whole instrument be collected that the true object and intent of it are to bind the principal, and not to bind the agent, courts of justice will adopt that construction of it, however informally it may be expressed." Section 69.

No agency is disclosed upon the face of this note except by the addition of the * * * word "agent" to the signature of the promisor. There is nothing upon the instrument itself to indicate whose agent he was in the transaction, nor what principal, if any, he intended to make responsible.

It was said by this court in the recent case of *Fuller v. Hooper*, 3 Gray, 341, that "the rule is general, if not universal, that neither the legal liability of an unnamed principal to be sued, nor his legal right to sue, on a negotiable instrument can be shown by parol evidence." "In other simple contracts the rule is different." * * *

Exceptions overruled.

SECTION 2.—LIABILITY OF AGENT TO THIRD PARTY —IN TORT

The agent is liable to third parties for his torts.

All persons owe to others the duty not to injure them through negligence or misconduct. The fact that at the time the injury occurred the perpetrator was acting as an agent for another does not excuse or affect his liability therefor. Nor does the fact that, under the doctrine of imputed negligence the principal may be held liable for the agent's torts, excuse or affect the agent's liability. The third party may hold the agent liable. Although an agent be merely carrying out the express directions of his principal, and may fully believe that the property or money he is disposing of belongs to his principal, if it in fact does not, the true owner may hold the agent for conversion or trespass. No one can avoid liability for his torts by showing that he was acting as agent for another. For example, where a grocer's delivery boy, driving in a negligent manner, causes an injury to a pedestrian, the injured person may sue either the delivery boy or the grocer, or both.

ILLUSTRATIONS

1. A was agent for P in full charge of an apartment building. He built a new walk in the court of the building, leaving a large hole in the walk into which T, a tenant, fell and was injured. A was held liable to T for damages by reason of his negligence.¹

¹ *Carson v. Quinn*, 127 Mo.App. 525, 105 S.W. 1088 (1907).

2. A was agent for P and was instructed to sell certain goods. He sold them without knowledge that they were stolen goods. T, the actual owner of the goods, learned of the transaction and sued A. It was held that A was liable for conversion, even though he acted innocently and under P's direction.²

3. A was sued by T for damages for false imprisonment by reason of having commenced certain suits in P's name against T. A defended on the ground that he was an agent for P and carrying out P's express instructions. It was held to be no defense to A.³

4. A was an officer of a corporation which employed T, a minor, in a dangerous occupation in violation of the statute. For personal injuries received while working, T sued the corporation and A. It was not shown that A had anything to do with hiring T or with his work. It was held that a man was not liable merely because he was an agent of a corporation which was guilty of a tort; that he must be so connected with the tortious act as to be personally chargeable, without regard to the corporation's liability.⁴

² *Laughlin v. Barnes*, 76 Mo.App. 258 (1898). ⁴ *Froerer v. Baker*, 137 Ill.App. 588 (1907).

³ *Josselyn v. McAllister*, 22 Mich. 300 (1871).

CHAPTER 3

LIABILITY OF AGENT TO PRINCIPAL

Section

1. Duty to Obey Instructions.
 2. Loyalty—Agent is in a Position of Trust and Confidence.
 3. Agent's Duty of Care and Skill.
-

SECTION 1.—DUTY TO OBEY INSTRUCTIONS

The agent owes to his principal the duty to follow instructions and execute his authority strictly.

It is the duty of the agent carefully to follow the instructions given him by the principal. If he exceeds these instructions and enters into unauthorized contracts for which the principal may be made liable, the agent will be liable to the principal for all damages suffered by the principal arising therefrom.

It will be observed from the above statement that unless the principal has been damaged by the agent's violation of this duty, the agent cannot be made to respond to his principal. The principal will only be damaged where the agent's act imposed liability on the principal. But no such liability can be imposed (in the contract field, that is) where the agent acted beyond his apparent authority. And if he acted within his express or implied authority, there could have been no violation by him of instructions. Thus it will be seen that the agent's liability to his principal for breach of duty to obey instructions can only occur where (1) the agent has acted beyond his express and implied authority, (2) but within his apparent authority.

SPALDING v. HEIDEMAN et al.

Appellate Court of Illinois, 1901. 96 Ill.App. 405.

It appeared from the evidence that one Louis Heideman, being a parish priest of the Catholic church of Loda, Illinois, wishing to

erect in the city of Paxton a Catholic church, he requested the privilege of so doing from Bishop Spalding, the bishop of the diocese in which Paxton is located. Spalding, as such bishop, owning several lots in said city of Paxton, authorized Heideman to build a church thereon, not to exceed in cost the sum of \$2,000. Father Heideman proceeded to build a church on the lots costing \$7,000, which excess of cost was unknown to Bishop Spalding until after the church was built. * * *

WATERMAN, J. * * * It is a fundamental duty of an agent to obey all reasonable and lawful instructions given to him by his principal; and this although the agent may think he knows of a very much better way. If the agent disobeys instructions given to him, and because of such disobedience, loss or injury comes to the principal, the latter may recover from the agent such substantial damages as he has sustained by reason of such disobedience. Mechem on Agency, §§ 473, 474.

Father Heideman having exceeded the authority given to him by Bishop Spalding, and thereby charged the bishop's property with liens amounting to several thousand dollars and quite likely involved the bishop in a large personal liability, was responsible to the bishop for all costs and expense he was put to by reason of such disobedience. * * *

SECTION 2.—LOYALTY—AGENT IS IN A POSITION OF TRUST AND CONFIDENCE

(1) AGENT CANNOT MAKE PERSONAL PROFIT

All personal profits made by an agent in connection with his principal's business belong to the principal. An agent owes to his principal full and undivided loyalty.

An agent must conduct himself with the utmost loyalty and fidelity to the interests of his principal; and he must not place himself in a position where his own interests or those of any other person he has undertaken to represent may conflict with his principal's interests. All personal profits so made are held in

trust by the agent for the principal. Thus, an architect or superintendent of construction cannot be a secret partner of the contractor. An agent stands in a position of trust and confidence toward his principal, which forbids his making a private profit from the information which he acquires concerning his employer's affairs.

ESSEX TRUST CO. v. ENWRIGHT et al.

Supreme Judicial Court of Massachusetts, 1913.
214 Mass. 507, 102 N.E. 441, 47 L.R.A.,N.S., 567.

LORING, J. The question on which the decision in this case depends is this: In case a reporter on a newspaper in the course or by reason of his employment learns that the premises on which the business of polishing the paper is conducted are of peculiar value to his employer or one carrying on his business, has he the right without his employer's knowledge to take a lease of the premises and hold them as his own to the injury of his employer's property? * * *

[The defendant was a reporter in the employ of the paper. He secretly secured a lease of the premises occupied by his employer, and immediately served a notice to vacate the building. This is a bill in which the plaintiff trust company, owner of the newspaper and employer of defendant, seeks to have the defendant enjoined from interfering with the possession held by it of the premises in Lynn, and from instituting any proceedings for their eviction, and further seeks that defendant may be decreed to hold said lease as "constructive trustee" for the plaintiff company.]

The findings already stated establish the peculiar value which these premises had to the defendant's employer or to any one carrying on the employer's business of publishing this newspaper. And it is evident from the * * * facts found, that the defendant learned in the course or by reason of his employment of the peculiar value which these premises had for his employer. * * *

The doctrine invoked by the plaintiff in this suit had its origin in two decisions by Lord Eldon. In *Yovatt v. Winward*, 1 Jac. & W. 394, the defendant (formerly employed as a clerk

by the plaintiff, who was a veterinary surgeon) was enjoined from using medicines compounded from the plaintiff's recipes which he (the defendant) had surreptitiously copied while in the plaintiff's employ. In Abernethy v. Hutchinson, 3 L.J.(O.S.) Ch. 209, the publication in the Lancet of lectures on surgery delivered by the plaintiff at St. Bartholomew's Hospital, which the defendants had obtained from the students attending the lectures, was enjoined. * * *

There are two cases, one in California and the other in Illinois, which have gone as far in the application of this doctrine as we are asked to go in the case at bar. In Gower v. Andrew, 59 Cal. 119, 43 Am.Rep. 242, the defendant, a clerk employed by the plaintiffs, who were warehousemen, secured a lease of the warehouse in which the business was conducted, behind his employers' backs by telling the owner of it that the "plaintiffs would probably give up the warehouse," and offering an advance of \$50 a month in the rent. The defendant then began soliciting custom for himself as the successor of his employers. On this becoming known he was discharged by his employers and was ordered by the court to assign the lease to the plaintiffs. In Davis v. Hamlin, 108 Ill. 39, 48 Am. Rep. 541, Davis, who was the defendant in the court below, was hired by Hamlin, the lessee of one of four important theaters in Chicago, as his business manager. A year and three months before Hamlin's lease expired Davis behind Hamlin's back secured a lease for himself by giving \$4,500 more rent a year. It appeared in evidence that Hamlin had built up a good will in connection with his theater by ten years' occupancy. Davis was directed to hold the lease which he had secured as trustee for Hamlin.

The defendant has argued that he was not within this rule because the duty of securing a lease was not intrusted by his employer to him. The same contention was the main argument put forward in Davis v. Hamlin and was true of the clerk in Gower v. Andrew. The complaint against the defendant is that he has made use of information which has come to him in his employment to the detriment of his employer. In our opinion that is enough to entitle the employer to equitable relief. * * *

The plaintiff is entitled to a decree directing the defendant to assign to the plaintiff the lease obtained by him on being paid the rent, if any, paid by him under it, and to its costs. * * *

(2) AGENT CANNOT CONTRACT FOR PRINCIPAL WITH HIMSELF

Except with full knowledge and consent of his principal, and with full disclosure of all material facts, an agent authorized to buy for his principal may not buy of himself, nor an agent authorized to sell, sell to himself.

As the agent is employed to further the interests of his principal by using his experience and skill for the principal's benefit he cannot contract with the principal himself because in so doing his own interests come into conflict with those of his principal, thus defeating the very purpose for which he was employed. Such a contract may always be disregarded and set aside by the principal, without the necessity of showing fraud on the agent's part.

PORTE et al. v. RUSSELL et al.

Supreme Court of Indiana, 1871. 36 Ind. 60, 10 Am.Rep. 5.

BUSKIRK, J. [This was a bill for injunction filed by the stockholders of a road company, praying that the treasurer of the corporation be restrained from paying out any money on a contract for the construction of a gravel road. The essence of the complaint is that the directors, the agents of the plaintiff corporation, were in fraudulent collusion with the road contractors to whom they had let the contracts for road construction. There is some evidence to the effect that an agreement existed whereby one of the contractors had agreed to share his profit on the contract with the directors. Further, it appeared from the evidence as an uncontested fact that one of the road contractors to whom a portion of the contract had been let was also a director of the company.]

The question presented for our consideration and decision is: Can a director in an incorporated company become a contractor with the company, or can he have any personal and pecuniary

interest in a contract between the company of which he is a director and a third person? We think the law is well settled, both in England and in this country, that he cannot. In the case of Aberdeen Railway Company v. Blakie, 1 Macq.Ap.Cas. 461, the House of Lords, reversing the judgment of the court below, held that a contract entered into by a manufacturer for the supply of iron furnishings to a railway company of which he was a director, or the chairman at the date of the contract, was invalid, and not enforceable against the company.

Lord Cranworth, in delivering the opinion of the court, says: "A corporate body can only act by agents, and it is, of course, the duty of those agents so to act as best to promote the interest of the corporation whose affairs they are conducting. Such an agent has duties to discharge of a fiduciary character toward his principal; and it is a rule of universal application, that no one having such duties to discharge shall be allowed to enter into engagements in which he has, or can have, any personal interest conflicting, or which possibly may conflict, with the interests of those whom he is bound to protect. So strictly is this principle adhered to that no question is allowed to be raised as to the fairness or unfairness of a contract so entered into.

* * *

[Under the sole circumstance of identity of interest existing between the parties to this contract, we are of the opinion that it should not be enforced, and that an injunction should issue in accordance with the prayer contained in the bill.]

SECTION 3.—AGENT'S DUTY OF CARE AND SKILL

It is the duty of the agent not to be negligent in the performance of his undertaking. Negligence is the failure to exercise that degree of care reasonably to be expected under the circumstances. Breach of this duty makes the agent liable to his principal for the damage caused.

The agent owes to his principal the exercise of that degree of care and skill which a reasonably prudent person would be

expected to exercise in similar circumstances. The professional man, the doctor, lawyer, architect, builder, owes to the person who employs him this duty of care and skill. It is to be observed that, apart from a special contract to that effect, there is no insurance nor warranty that a certain result will be produced; all that the law requires from the holding out is the exercise of that degree of skill, knowledge, and care usually displayed by similar members of the profession in similar circumstances. By accepting an employment whose requirements he knows, the agent impliedly undertakes that he possesses and will exercise that degree of care and skill which a reasonably prudent person would exercise. So if a lawyer practicing in Iowa undertakes to represent a client in Illinois, he is bound to familiarize himself with the Illinois law affecting his client's interests. Or if an architect, familiar with design but knowing nothing of structural engineering, undertakes to figure stresses for a bridge, he thereby becomes bound to acquire the degree of care, skill and knowledge ordinarily possessed by a structural engineer.

CHAPEL v. CLARK.

Supreme Court of Michigan, 1898.
117 Mich. 638, 76 N.W. 62, 72 Am.St.Rep. 587.

Plaintiff, an architect, executed plans and specifications for the defendant for a large building erected in the city of Grand Rapids. The arrangement rested in parol. * * * Before the building was completed a difficulty arose between them, and plaintiff was discharged. He thereupon instituted this suit to recover the value of his services in drawing the plans and specifications. The defendant, with the plea of the general issue, gave notice that plaintiff had not performed his work with due and necessary skill and care; that his plans and specifications were faulty, defective, and unskillful; and specified the details where they were faulty. Plaintiff recovered verdict and judgment.

GRANT, C. J. (after stating the facts). 1. Defendant requested the court to instruct the jury that if they found the contract as claimed by plaintiff, and they should further find that by mistake of the plaintiff the defendant had been caused unneces-

sary expense in the construction of the building, they should determine the amount of such unnecessary expense, and deduct it from the value of the services rendered. This was refused, and the court instructed the jury as follows: "The notice of defendant, which I have called your attention to, alleges that the plans and specifications drawn by the plaintiff were unskillfully drawn, whereby the alleged damages resulted. A person who holds himself out to the public in a professional capacity holds himself to be possessed of average ability in such profession, and the law implies that he contracts with his employer (1) that he possesses that requisite degree of learning, skill, and experience which is ordinarily possessed by the profession in the same art or science, and which is ordinarily regarded by the community, and by those conversant with that employment, as necessary and sufficient to qualify him to engage in such business; (2) that he will use reasonable and ordinary care and diligence in the exercise of his skill—in the application of his knowledge—to accomplish the purpose for which he is employed; (3) in stipulating to exert his skill and apply his diligence and care, an architect, like other professional men, contracts to use his best judgment. * * * A mistake in judgment does not excuse negligence or ignorance."

The request does not correctly state the law. It makes the architect a warrantor of his plans and specifications, although they might be justified by the knowledge and experience of those ordinarily skilled in the business. The law does not imply such a warranty or the guaranty of the perfection of his plans. The result may show a mistake or defect in them, although he may have exercised the reasonable skill required. Plans, now considered safe, experience and advanced knowledge of the science may hereafter show to be unsafe. The law requires only the exercise of ordinary skill and care, in the light of present knowledge. Coombs v. Beede, 89 Me. 187, 36 A. 104; Shipman v. State, 43 Wis. 381; Smothers v. Hanks, 34 Iowa 290; 2 Am. & Eng. Enc. Law 2d Ed. 818. The above authorities seem to hold that the responsibility of an architect does not differ from that of a lawyer or physician. When either possesses the requisite skill and knowledge, and in the exercise thereof has used his best judgment, he has done all that the law requires. The question was, had plaintiff exercised that degree

of care and skill and that judgment which are common to the profession or business? The defects alleged to exist in the plans were in the construction of the sewer, the cornice, and coping for the towers, the stairway and elevator, and the flue of the chimney. If the plans and specifications for these parts of the building were justified by the common knowledge upon such matters at the time, and met the judgment and approval of those then ordinarily skilled and experienced in their construction, the plaintiff had complied with his contract. We think that the jury must so have understood the instructions.

* * *

COREY v. EASTMAN.

Supreme Judicial Court of Massachusetts, 1896.
166 Mass. 279, 44 N.E. 217, 55 Am.St.Rep. 401.

Plaintiff, James R. Corey, employed Joseph S. Eastman, an architect, to draw plans and specifications for a house. He also asked the defendant to draw the contract with the builder. Defendant drew the contract, and delivered it to plaintiff, who executed it with the builder. The contract provided for six payments, to be made at various stages in the work. On the 1st of July, 1891, the builder demanded the first payment called for by the contract. He presented a certificate from the architect stating that the amount of work called for by the contract had been completed, and that the first payment was therefore due. Plaintiff examined the work, and found that it did not comply with the requirements of the contract, and so informed the architect. The architect represented, however, that the work which had been performed was worth more than the amount called for in the contract. Acting upon the representation, plaintiff paid the builder the first installment due. The builder then abandoned the contract, and went into insolvency.

HOLMES, J. This is an action against an architect for alleged misstatements of the amount of work done under a building contract, by the terms of which, as usual, partial payments were to be made from time to time upon the architect's certificate. The jury found a verdict for the defendant on the first count, so that only the second count needs to be considered.

On that they found for the plaintiff. The case is here on a report of the defendant's appeal and exceptions. * * *

The claim for damages was put to the jury as standing on an alleged negligent or willfully false statement by the defendant, in conversation with the plaintiff, distinct from the defendant's act of certifying the sum paid to be due. No question of variance is before us, but the question raised is whether the defendant was liable, as a matter of substantive law, if he made such a negligent statement to the plaintiff as to the value of the work done, and the plaintiff paid on the strength of it. Probably, under the English law, the defendant would not be liable for negligence in making his certificate upon a matter which the plaintiff and the builder had agreed by their contract to leave to him. Stevenson v. Watson, 4 C.P.Div. 148.

* * * But a different principle may come in with regard to oral advice or statements to his employer. In making them, the architect is, or may be found to be, rendering a purely partisan service under his contract; and, if he is, then he is bound to show reasonable care, and reasonable professional judgment. As a consequence of his contract of employment, the law throws the risk of his statements upon him at an earlier point than it would do otherwise. But for the contract, he would not be liable for statements, unless fraudulent, or for advice, unless dishonest. Under the contract, negligently erroneous statements and imprudent advice become torts, on the same principle that, under a warranty, an erroneous statement was a deceit, by the old common law, without even negligence. * * *

Judgment on the verdict.

LOTHOLZ v. FIEDLER.

Appellate Court of Illinois, 1895. 59 Ill.App. 379.

Mr. Presiding Justice WATERMAN delivered the opinion of the court.

This is a suit by the appellee, an architect, against the appellant, to recover for work in the preparation of plans, etc., and superintending building. As stated by counsel for appellee in his opening address to the jury:

"The plaintiff is an architect and he was employed by the defendant to draw the plans and specifications, let the contracts for, and superintend to completion, the erection of a fine mansion for the defendant and his family to live in. It was especially agreed in this case, that the plaintiff was to draw the plans and specifications, and superintend the construction of the building from beginning to end, for a commission of five per cent. on the cost of the building when complete. He was also employed to draw plans for a barn and other houses. The plaintiff claims that he did draw the plans and specifications, let the contracts, and superintended the work until completed, of a house that cost a little over \$34,000, and is entitled to five per cent. on that sum, and the defendant has refused to pay him, and he has brought this suit to recover his commission, and for the services in drawing the sketches and other plans."

The duties of appellee among others were as stated in the building contracts.

"Section 5. The proprietor has engaged August Fiedler to be superintendent and agent in the premises. The duties of this office being to enforce all the conditions of the contract, and to furnish all the necessary drawings and information that are required to properly illustrate and explain the design given."

Did appellee discharge his duties, so that he is entitled to the commission he asks, something over \$1,700? is the question of fact presented by this case.

Appellee was employed to draw plans and specifications for, and superintend the construction of, a first-class expensive house, and was to be paid a large sum for doing this work. The house he thus undertook to see that appellant obtained was defective in several important matters. One of the chimneys seems to have been very imperfectly constructed; it was not plastered, as the specifications demanded; there were cracks in it out of which the smoke poured into the hall when a fire was lighted in the furnace below; the windows in some of the rooms admitted the rain because mortar had not been put at the sides; the mouldings had to be taken off and the space packed with oakum. Nails were driven through the plumbing pipes and they leaked. As to this appellee says he "defies any one superintending that building to detect the fact that the carpenter had driven those nails through the pipe."

Appellee was not so much employed to detect the fact that the carpenters had driven nails through the plumbing pipes as he was to prevent this being done. He was to superintend, to enforce all the conditions of the contract, and most certainly he should have seen to it that nails were not driven through plumbing pipes.

Such gross carelessness and imperfect construction it was his duty to have prevented.

The window weights were, by written contract, to have been of lead; those put in were mostly iron. Appellee attempts to excuse this by showing that Mr. Lotholz was about the house at times during its construction, and that iron window weights were lying around, which he must have seen. If Mr. Lotholz did see this, it did not change the written contract or relieve appellee from his duty to see that it was carried out.

It is unnecessary to go over all the defects, imperfect construction of this house, which the evidence shows existed, and for which no sufficient excuse is given.

Appellee is not, under the evidence presented by this record, entitled to be paid as if he had superintended, so as to give appellant a house in accordance with the contracts he, appellee, undertook to see fulfilled.

Appellant, in an affidavit by him filed, admitted an indebtedness of \$300.

Appellee having recovered a verdict for the full compensation he was to have if he performed his undertaking, the judgment of the circuit court is reversed and the cause remanded, unless appellee will remit from his judgment so as to leave it \$300.
* * *

CHAPTER 4

LIABILITY OF PRINCIPAL TO AGENT

Section

1. In Contract.
 2. In Tort—Liability of Master to Servant for Injuries.
-

SECTION 1.—IN CONTRACT

1. PRINCIPAL'S LIABILITY FOR DISCHARGE OF AGENT

(1) *In Agency Without Fixed Term*

Where an agency is an agency at will, either party may terminate it at any time, but the principal will of course be liable to compensate the agent for services performed which he has accepted. He may not terminate the employment merely to escape payment of compensation when the agent has substantially performed.

SIBBALD v. BETHLEHEM IRON CO.

Court of Appeals of New York, 1881. 83 N.Y. 378, 38 Am.Rep. 441.

[Action for commission in selling steel rails. It appeared that the plaintiff had been employed by the defendant as broker to sell steel rails, particularly to the Grand Trunk Railway, with whom the plaintiff was supposed to have influence. In December, plaintiff interviewed officers of the railroad, but could get no results. During the succeeding four months plaintiff could do nothing to get the railroad interested. On April 7 the plaintiff received a request for a price, and, receiving a price from the defendant, he quoted this price and also a price from other parties for whom the plaintiff was broker. The railroad accepted the other offer. Later in the month plaintiff sent the railroad a sample of the defendant's iron and on the 23d of April received from it a request for a price from the defendant for 1,000 tons. At an interview which followed between the plain-

tiff and the president of the defendant, the latter refused to make a price or to deal further through the plaintiff. The sale was finally made to the Grand Trunk on May 13, through another broker.

[At the trial the judge, after charging the jury that the plaintiff could not recover if he had been unsuccessful, added: "That the defendant had no right to refuse to avail himself of those things which the broker had done and then, indirectly—no matter whether in good or in bad faith—by other channels, avail itself of the effort of the broker with whom it has declined to continue the negotiations."

[The defendant excepted to this charge and to a refusal to give other charges, and, upon judgment for the plaintiff, appealed.]

FINCH, J. * * * It may aid * * * to clearness of statement and accuracy of conclusion, and perhaps remove some elements of debate, if we consider the legal attitude of a broker employed to buy or sell property, and his relative rights and duties as the basis of his claim for compensation.

The duty he undertakes, the obligation he assumes as a condition of his right to demand commissions, is to bring the buyer and seller to an agreement. In that all the authorities substantially concur, although expressing the idea with many differences of phrase and illustration. * * * In *Wylie v. Marine National Bank*, 61 N.Y. 416, it was held that to entitle the broker to commissions, he must produce a purchaser ready and willing to enter into a contract on the employer's terms. This implies and involves the agreement of buyer and seller, the meeting of their minds, produced by the agency of the broker. * * *

One other principle applicable to such a contract as existed in the present case needs to be kept in view. Where no time for the continuance of the contract is fixed by its terms, either party is at liberty to terminate it at will, subject only to the ordinary requirements of good faith. Usually the broker is entitled to a fair and reasonable opportunity to perform his obligation, subject of course to the right of the seller to sell independently. But, that having granted him, the right of the principal to terminate his authority is absolute and unre-

stricted, except only that he may not do it in bad faith, and as a mere device to escape the payment of the broker's commissions. Thus, if in the midst of negotiations instituted by the broker, and which were plainly and evidently approaching success, the seller should revoke the authority of the broker, with the view of concluding the bargain without his aid, and avoiding the payment of commissions about to be earned, it might well be said that the due performance of his obligation by the broker was purposely prevented by the principal. But if the latter acts * * * moved fairly by a view of his own interest, he has the absolute right before a bargain is made, while negotiations remain unsuccessful, before commissions are earned, to revoke the broker's authority, and the latter cannot thereafter claim compensation for a sale made by the principal, even though it be to a customer with whom the broker unsuccessfully negotiated, and even though, to some extent, the seller might justly be said to have availed himself of the fruits of the broker's labor. * * *

Because the broker originally brought the Bethlehem rails to the notice of the Grand Trunk purchasing officers, and thereafter accomplished nothing more than to lessen the principal's price and sell the rails of its rivals to the proposed customer, he is held entitled to recover commissions on a sale made without his intervention and after his agency had been fairly and lawfully terminated. Grant that what he did may justly be said to have aided in the making of the aftersale, yet that does not furnish ground for recovery, as we have already seen. If it did, such an agency might pass utterly beyond the principal's control. The trial judge, in the earlier part of this charge, had stated the general rule correctly, and as we hold it should be. He said to the jury, "If you find from the evidence in any given case, that the broker has failed to carry out any particular transaction, and that his efforts, although he may have introduced the parties, have terminated, and that he has not succeeded in making the trade, then the principal has a perfect right to resort to other sources for the purpose of effectuating that trade." If the charge had stopped here no error would have been committed. * * * He should have submitted the question of good faith in terminating the agency to the jury, and told them if they found that fact, that no commissions

could accrue on the aftersale, however much in making it the seller availed himself of the previous labors of the broker.

If, after the broker has been allowed a reasonable time, within which to produce a buyer and effect a sale, he has failed to do so, and the seller in good faith and fairly has terminated the agency and sought other assistance by the aid of which a sale is consummated, it does not give the original broker a right to commissions, because the purchaser is one whom he introduced and the final sale is in some degree aided or helped forward by his previous unsuccessful efforts. If the charge was intended to mean this, and no more than this, the language chosen was unfortunate, for its direct tendency was to convey to the jury an entirely different idea and one with which we do not concur.

* * *

Judgment reversed.

(2) In Agency for a Fixed Term

Where the contract of agency is for a fixed term, the principal has not the right to terminate the agency before expiration of the term, except:

- (1) Where he has reserved the right in the contract to discharge the agent at will;
 - (2) Where the agent has been guilty of such misconduct as will justify a discharge;
 - (3) By operation of law, the contract of employment is terminated by the death, insanity or extended illness of the employee.
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G. A. KELLY PLOW CO. v. LONDON.

Court of Civil Appeals of Texas, 1910. 59 Tex.Civ.App. 208, 125 S.W. 974.

HODGES, J. * * * The material facts which do not appear as being disputed show that the appellant is a private corporation engaged in the business of manufacturing and selling plows and other farming implements, with its place of business and principal office at Longview, Tex. Some time prior to February, 1907, G. A. Kelly, the president of the company, who had been actively engaged in the management of its affairs, desired

to retire, and turned over the business almost entirely to R. M. Kelly, his son, who was at the time secretary and treasurer. R. M. Kelly contemplated enlarging the capacity of the plant and also of extending the business of the company by employing additional traveling salesmen, and desired to employ a suitable man to take the position of sales manager of the company's business. * * * R. M. Kelly had known the appellee for about 10 years prior to the time when they began their negotiations which resulted in the contract referred to in the pleadings. These were commenced by a letter from Kelly to London, asking him to call at the office of appellant on his first visit to Longview. London was at that time employed by the Parlin & Orendorff Implement Company as one of its traveling salesmen, with headquarters at Dallas. On February 18, 1907, London called upon Kelly as requested, when the latter explained the intentions of his company as to enlarging its business, and expressed a desire to employ London to take charge of the sales department. After several meetings, in a conversation concerning the details, of which there is some conflict in the testimony, a written contract was entered into, by which London was employed by the appellant as sales manager for five years at a salary of \$333.33 per month, payable monthly. * * *

After the execution of this contract, London entered upon the duties of his position and continued therein till August 6, 1907, at which time he claimed that he was injured in a wreck on a Texas & Pacific Railway train while going from Dallas to Longview. From that time until October 4th he did not perform any services for the appellant. On the latter date he made a settlement with the railway company in which he was paid \$4,100 compensation for injuries which he claimed had been received in the wreck referred to. He then returned to work for the appellant, and continued in its service till he was discharged April 4. * * * The effect of the testimony of Kelly was that at the first meeting between him and London before making the contract the latter represented to him that he was then getting \$250 per month from the Parlin & Orendorff Implement Company, but would accept the position offered for \$300 per month. Witness further stated that he afterwards met London in Dallas, and was there told by him that Mr. Robinson, the local manager for the Parlin & Orendorff Implement Company, "was all broken

up and torn to pieces" about his (London's) leaving; that London told him that Robinson had told him (London) that he would meet any price that the Kelly Plow Company could afford to pay him; that, if it offered him \$3,600, he would meet that; if it offered him \$4,000 he would meet that, and, if that was not satisfactory, he (London) could go to the bookkeeper and tell him what would be satisfactory, and that it would be all right with him (Robinson). Kelly says this led him to believe that London was an exceedingly valuable man in that line of business, and that Robinson had implicit confidence in him, that he had formed a very high opinion of London, and believed everything the latter told him. * * * Robinson, the manager of the Parlin & Orendorff Implement Company, testified that London was in the employ of the Parlin & Orendorff Implement Company at a salary of \$200 per month; that his contract was to work by the year at a salary of \$2,400 per year to be paid monthly at \$200 per month, and that he was not to receive any additional compensation; that some time about March or April, 1907, London told him that the Kelly Plow Company offered him a salary of \$3,600 per annum, and he told the appellee that it was a larger amount than he could offer to pay, and that, if he could make the arrangement he (Robinson) was not disposed to stand in his way, and advised him to accept the position. He offered appellee \$50 per month additional, which would make \$250 per month, if he would sell \$200,000 worth of goods per annum.

As to the fraud which it is alleged the appellee perpetrated upon the railway company in procuring a settlement by which he was paid \$4,100 as compensation for injuries claimed, appellant offered testimony tending to show that the shock to the coach in which the appellee was at the time riding was so slight that no injury could have resulted; that an observation of the physical condition of the appellee after the wreck failed to disclose any evidences of the injuries he claimed. There was also testimony of doctors who had made an examination of London to the effect that, if he was injured at all, it was only in a slight degree. Considered in its entirety, the evidence offered by appellant upon this phase of the defense tended to show that London's injuries were simulated, and that he had by dishonorable means, false statements, and misrepresentations perpetrated a fraud upon the railway company for the purpose of obtaining money. As op-

posed to this, there was testimony on the part of the appellee tending to show that his injuries were real, and that he had made no false representations to the company and had not been guilty of any of the misconduct charged.

Upon a trial before a jury a verdict was rendered in favor of the appellee for the sum of \$3,000. * * *

If the different acts of deception, misrepresentation, and fraud charged in the answer of the appellant be true, then we cannot say that a jury would not be justified in concluding that they were inconsistent with the relations London sustained by his contract. Every one who seeks and obtains employment in positions of trust and confidence impliedly warrants that he is an honest man, and the employer has the right to expect the possession of that personal integrity that will not lead to disappointment if he relies implicitly upon the honor and fidelity of his employé. When the principal discovers that his agent or the master his servant is lacking in those moral qualities that he had a right to expect and rely upon in making the particular contract—in other words, ascertains that his employé is not an honest man and cannot be trusted—why should he not have the right to discharge? If he may discharge for incompetency, either physical or mental, why should he not have the same right when moral unfitness is shown, where moral qualifications form an important consideration in making the contract? We see no good reason why an employer should not be permitted to rid himself of a dishonest and corrupt employé upon a discovery of that fact, without waiting till he has himself been victimized by such corruption and dishonesty. He would have the right to assume that a man who would deliberately make a false statement about one matter would be equally perfidious about another; that a man who would willfully and knowingly perpetrate a fraud upon one party for the sole purpose of obtaining money would, when to his interest to do so, defraud his employer also. * * * Would it be seriously contended that the right of discharge could be exercised by the principal only when it became apparent that his own business was injuriously affected by having such an employé in his service? Would not common justice accord him the right to terminate the contract solely upon the ground that he might justly apprehend that he would in all probability be made the object of his agent's cupidity and fraud? Could the agent com-

plain when he had not disclosed his past record, because the principal then sought to relieve himself from a relation which he would not have made had he known the true facts? No man is compelled to be dishonest or to be guilty of fraudulent conduct. Neither should any other be compelled to continue such a person in a position of trust simply because he took him for a man of integrity and gave him employment. * * *

The judgment of the district court is reversed, and the cause remanded.

FRIED v. SINGER.

Supreme Judicial Court of Massachusetts, 1922. 242 Mass. 527, 136 N.E. 609.

Plaintiff was an actor, and was employed to render services as such. The contract provided that the services should be rendered to the satisfaction of the Columbia Amusement Company, in whose theaters defendant's show played. The agreement between defendant and the amusement company required defendant to make any changes in the personnel of the show required by the amusement company on written notice. Defendant moved for a directed verdict on the grounds that plaintiff was not entitled to recover, that as a condition precedent to recovery he must show that he performed the services to the satisfaction of the amusement company, and that plaintiff had offered no testimony which would warrant a verdict in his favor. At defendant's request the court charged that it was incumbent upon plaintiff to establish that the services were to the full and complete satisfaction of the amusement company, and that if the amusement company, acting in good faith, was not completely satisfied with the services rendered by plaintiff, plaintiff could not recover.

CROSBY, J. The plaintiff and defendant executed an agreement in writing under which the defendant (who was engaged in the theatrical business) was to employ the plaintiff (an actor) for the season of 1919-1920, which could have been found consisted of not less than 40 successive weeks.

Paragraph "Second (a)" of the agreement is as follows:

"The artist agrees to render his exclusive services to the producer for all performances in each week in which he shall be

required to appear and that may be lawfully given, and the artist stipulates that such services shall be rendered to the full and complete satisfaction of the Columbia Amusement Company in its exclusive judgment in accordance with the terms and conditions of the franchise agreement granted by said Columbia Amusement Company hereinbefore mentioned, with which conditions the artist hereby agrees that he is familiar, and which it is agreed are to be regarded as a part hereof." * * *

The plaintiff began his employment under the contract, August 18, 1919, and continued to render services until September 13 following, when he says he was wrongfully discharged by the defendant. * * *

As the plaintiff's services were to be rendered to "the full and complete satisfaction of the Columbia Amusement Company" the defendant's liability is conditional. To recover the plaintiff must prove that the services rendered by him were satisfactory to the amusement company. We cannot agree with his contemplation that the burden rested upon the defendant to show that the company was not satisfied in order to avoid liability. *Whelton v. Thompson*, 121 Mass. 346; *Newton Rubber Works v. Graham*, 171 Mass. 352, 50 N.E. 547; *Farmer v. Golde Clothes Shop, Inc.*, 225 Mass. 260, 114 N.E. 303.

A contract like the one here in question where the employee is to render personal services and where consideration of the fancy, taste, sensibility and judgment of another are involved, must be performed in accordance with its terms; and if the amusement company or its representative, acting in good faith, was not satisfied with the services of the plaintiff, he cannot recover, and the judge so instructed the jury. *McCarren v. McNulty*, 7 Gray, Mass., 139; *White v. Randall*, 153 Mass. 394, 26 N.E. 1071; *Whittemore v. New York, New Haven & Hartford Railroad*, 191 Mass. 392, 77 N.E. 717.

Even if the work performed would be satisfactory to a reasonable man, if the amusement company, acting in good faith, was dissatisfied with it, the plaintiff cannot recover. *Williams Mfg. Co. v. Standard Brass Co.*, 173 Mass. 356, 53 N.E. 862; *Farmer v. Golde Clothes Shop, Inc.*, supra. * * *

In the opinion of a majority of the court, as the plaintiff failed to prove that he performed the services contracted for to the

satisfaction of the amusement company, the motion of the defendant that a verdict be directed in his favor should have been allowed.

Exceptions sustained.

MAY v. NEW YORK MOTION PICTURE CORPORATION.

District Court of Appeal, Second District, Division 2, California, 1920.
45 Cal.App. 396, 187 P. 785.

FINLAYSON, P. J. This is an action by a motion picture actress, employed by defendant, to recover for an alleged wrongful discharge, alleged to have occurred about 21 weeks before the expiration of the term of her employment. From a judgment for plaintiff for \$2,123.60, based on the verdict of a jury, defendant appeals. * * *

Plaintiff commenced work for defendant on June 16, 1915, at defendant's camp or studio at Inceville, in Los Angeles county, about 3½ miles from the city of Santa Monica, and continued in its employ until discharged on January 27, 1916. During all this time plaintiff made her home at Santa Monica. The last day she worked for defendant was December 24, 1915. On that day defendant finished a picture in which plaintiff had been cast, and in which she had worked for some weeks. Except when specifically notified and sent for, plaintiff never went to the camp or studio, except weekly to draw her weekly pay check. Witnesses for defendant testified that prior to December 24, 1915, and during the time when plaintiff was acting parts in which she had been cast, she frequently arrived on the grounds so late that her tardiness caused exasperating delays that threw the whole working organization out of joint, causing defendant considerable financial loss. Other actors and actresses, and persons employed in connection with rehearsals and work before the camera, arrived on the ground, as a rule, not later than 8:30 o'clock in the morning; while, according to defendant's witnesses, plaintiff frequently was as late as 10 and 11 o'clock in arriving on the scene of her duties. When not actually working for defendant, plaintiff did not remain in her home at Santa Monica all day long so that she might readily be communicated with by telephone or other

convenient means of communication, in the event that she might be needed at the studio to enact some rôle. * * *

On January 22, 1916, defendant caused to be delivered to plaintiff a letter—written and signed on the 13th—which is as follows:

"Miss Lola May: In the future it will be absolutely necessary that you report at the studio every morning not later than 8:30 A.M., *irrespective of whether you are cast or not*, and not absenting yourself when you think you are not cast, as you have taken upon yourself to do in the past. Yours very truly, E. H. Allen, Manager."

This order we shall designate as the order of January 22, 1916—the date of its delivery—though it was written and signed on the 13th. Whether this order is consistent with the written contract of employment, and whether it is a reasonable order, are the principal questions presented on this appeal. * * *

Plaintiff did not report at defendant's studio on the 24th, 25th, or 26th days of January, 1916. She was discharged on January 27th * * *

The relation of master and servant which in contemplation of law existed between these parties, cast certain duties upon plaintiff, as the servant, which she was bound to fulfil and discharge; the principal one was that of obedience to all reasonable orders of the defendant, the master, not inconsistent with the contract. "A promise by the servant to obey the lawful and reasonable orders of his master within the scope of his contract is implied by law." Lacy v. Getman, 119 N.Y. 115, 23 N.E. 452, 6 L.R.A. 728, 16 Am.St.Rep. 806. * * *

Disobedience of a reasonable order is a violation of duty which justifies a rescission by the master of the contract of employment and peremptory discharge of the servant. Jerome v. Queen City Cycle Co., 163 N.Y. 351, 57 N.E. 485; * * * The law is thus summarized in Fraser on Mast. & S. p. 71:

"Where a servant deliberately violates his master's orders, or refuses to obey them when given, he is clearly guilty of the grossest breach of contract. His duty is to obey the master in all things for which he became bound expressly, or in which obedience is implied from the nature of the service undertaken."

* * *

We see nothing in the contract with which the order can be said to be inconsistent. By her contract plaintiff engaged to "enact rôles in the motion picture productions" of defendant. The order of January 22, 1916, did not require plaintiff to perform service of a kind other than or different from that called for by her contract of employment, namely, the enactment of rôles in motion pictures produced by defendant. The sole purpose of the order was to insure plaintiff's presence at a certain place, near the spot where the pictures were being filmed. * * *

We conclude, therefore, that the order to report at the studio every morning not later than 8:30 was consistent with the contract between the parties; that, if the circumstances were as described by defendant's witnesses, the order was reasonable and fair; and that * * * if it be true, as testified by defendant's witnesses, that plaintiff was frequently tardy, and defendant, at times, had difficulty in reaching her by telephone in order to notify her to be present to enact her rôles, then the order was reasonable; and a willful disobedience of its terms would be good ground for plaintiff's discharge. * * *

2. PRINCIPAL'S LIABILITY TO REIMBURSE AGENT FOR ADVANCES

The principal must reimburse the agent for all expenditures and advances of money made by the agent at the principal's request, in furtherance of his authorized duties.

In the various situations discussed herein where the agent has incurred a personal liability for carrying out the express directions of the principal, within the authority granted, the principal is bound by law, without any express agreement to that effect, to reimburse and indemnify the agent for such loss or damage sustained. But the agent must have acted in good faith, in accordance with his authority, and under a belief that the act was not improper or illegal. And, if the act was obviously illegal the agent is bound to know it, and cannot recover upon either an express or implied promise to indemnify. The undisclosed principal must indemnify the agent where the third party elects to hold the agent, rather than the principal, on the contract.

Where the agent has necessarily expended money in the carrying out of the agency, and the amount is reasonable and may be said to have been within the contemplation of the parties, he is entitled to be reimbursed.

D'ARCY v. LYLE.

Supreme Court of Pennsylvania, 1813. 5 Bin. 441.

[Plaintiff declared for money paid and expended, money lent and advanced, work, labor, and services. At the trial there was a verdict for the plaintiff in the sum of \$3500. Defendant moved for a new trial.]

The facts were as follows: Defendant sent plaintiff to Haiti, with a power of attorney to demand from Suckley & Co., heretofore defendant's agents at Haiti, all of defendant's goods remaining in their hands, and to settle all outstanding accounts. On the voyage, the plaintiff, in consequence of being chased by a French privateer, threw overboard, among other papers, the power of attorney. He stated this fact to Suckley & Co. upon his arrival, who consented to deliver up the goods, upon his promising to pay a balance which they alleged to be due from the defendant; and this being assented to by the plaintiff, they proceeded to deliver the goods. Before the delivery was complete, one Thomas Richardson attached them with other goods of Suckley & Co., to secure a debt due by them to the house of Knipping & Steinmetz of Charleston, for whom he was agent. The plaintiff interposed a claim on behalf of the defendant; and * * * the Chamber of Justice decreed that he should retain possession of the merchandise. [The plaintiff then sold the goods and sent the money to the defendant, at the same time resigning from his position as defendant's agent. Up to this time, General Dessalines, autocratic ruler of Haiti, acted as plaintiff's friend and sponsor. Within three months the government of Dessalines was overthrown and one Christophe succeeded to the dictatorship. Christophe it appears was a friend of Richardson; and on the accession of the new ruler to power] Richardson instituted a suit against the plaintiff in the Tribunal of Commerce, to recover from him the value of the goods, which by the decision of the Chamber of Justice had been decreed to him as the defendant's agent in

1804. * * * On the 14th of May [1805] the Tribunal of Commerce gave judgment for D'Arcy. [Here, however, Christophe interfered. He imprisoned D'Arcy's lawyer, and ordered that the case be tried by wager of battle, which he specified must be fatal to one of the parties; D'Arcy and Richardson to fight at six o'clock the next morning, Christophe to be there to see the affair settled. That night Christophe sent for D'Arcy, and the upshot of this meeting was that the next day, after the court had rendered judgment in his favor, D'Arcy in open court retracted his defense, and consented that the judgment be reversed and that he pay to Richardson the value of the defendant's goods delivered to him by Suckley & Co. Plaintiff paid Richardson the amount, and on his return to the United States filed suit against the defendant for money paid out by an agent for his principal's use.]

TILGHMAN, C. J. * * * The confession of judgment was beyond all doubt extorted from the plaintiff by duress, and he did not yield to fears of which a man of reasonable firmness need be ashamed. The material fact on which this case turns is whether the transactions between the plaintiff and Richardson were on any private account of the plaintiff, or solely on account of the defendant [principal]. That was submitted to the jury, and we must now take for granted that the proceedings at the Cape * * * were in consequence of his having received possession of the defendant's goods from Suckley & Co. I take the law to be * * * that damages incurred by the agent in the course of the management of the principal's affairs, or in consequence of such management, are to be borne by the principal. It is objected that at the time when judgment was rendered against the plaintiff he was no longer an agent, having long before made up his accounts and transmitted the balance to the defendant. But this objection has no weight, if the judgment was but the consummation of the proceedings which were commenced during the agency. As such I view them, and I make no doubt but they were so considered by the jury. It is objected again, that no man is safe if he is to be responsible for an unknown amount for any sums which his agent may consent to pay, in consequence of threats of unprincipled tyrants in foreign countries. Extreme cases may be supposed, which it will be time enough to decide when they occur. I beg it to be understood, that I give no opinion on a case where an agent should

consent to pay a sum far exceeding the amount of the property in his hands. That is not the present case, for the property of the defendant, in the hands of the plaintiff in 1804, was estimated at \$3,000. The cases cited by the defendant show that if the agent, on a journey on business of his principal, is robbed of his own money, the principal is not answerable. I agree to it, because the carrying of his own money was not necessarily connected with the business of his principal. So if he receives a wound, the principal is not bound to pay the expenses of his cure, because it is a personal risk which the agent takes upon himself. * * * In the case before us, the plaintiff has suffered damage without his own fault, on account of his agency, and the jury have indemnified him to an amount very little, if at all, exceeding the property in his hands, with interest and costs. I am of opinion that the verdict should not be set aside. * * *

New trial refused.

SECTION 2.—IN TORT—LIABILITY OF MASTER TO SERVANT FOR INJURIES

1. UNDER THE COMMON LAW

Employer's Liability for Negligence.—Under the principles of the common law—that is, in the absence of statutory law on the subject—the employer is liable to the employee for injuries due to the negligence of the employer. It is the duty of the employer to use due care for the safety of his employees while they are performing their work. Such due care is that degree of care which a reasonably prudent person would exercise in like circumstances. This includes furnishing a reasonably safe place to work, reasonably safe tools and appliances, and in hiring reasonably careful men. Failure to observe the degree of care required, is negligence on the part of the employer; and if injury results therefrom, the employer is liable for the damage suffered.

Employer's Defenses.—In limitation of the employer's liability for negligence, there grew up in the law certain doctrines which

constitute complete defenses to his liability. These are: (1) The defense of contributory negligence; (2) the defense of assumption of risk; and (3) the fellow-servant doctrine.

Defense of Contributory Negligence.—If the employer can prove that at the time of the injury the employee was himself guilty of negligence, and that his lack of care contributed to the injury, this will constitute a complete defense to the employer's liability. Even though the injury was caused by the employer's negligence, if, at the time of the injury and contributing thereto, the employee failed to exercise due care for his own safety, he cannot recover. In short, where the employee's negligence contributes to the injury, the employer is not liable.

Defense of Assumption of Risk.—Where the employer can show that the injury to the employee resulted from a danger or hazard which is common to the particular employment in which he was engaged, this will constitute a defense. The workman, in undertaking any employment, is taken to have assumed the ordinary risks of the employment. That in fact he might not or did not know of them is immaterial; he is conclusively presumed to know of all dangers inherent in the work he has undertaken. If the injury results from an ordinary hazard of the employment, the employer is not liable.

In addition, although the employee is not held to have assumed dangers unusual or extraordinary to the employment beyond his knowledge, still if he continues in the employment after learning of such extraordinary dangers, he is deemed to have assumed these also. Thus, under the doctrine of assumption of risk, for a workman to recover for injury caused by defective machinery, it is necessary for him to prove: (1) That the appliance was defective; (2) that the employer was chargeable with knowledge of the defect; (3) that he, the employee, did not know, and in the exercise of ordinary care for his own safety could not have known, of the defective condition.

Fellow-Servant Doctrine.—The third defense open to the employer, the fellow-servant rule, relieves the employer from liability for all injuries to employees which result from the negligence of a fellow employee. The first case to lay down this principle was a case decided in England early in the nineteenth cen-

tury, in which a butcher's helper was injured due to the carelessness of another of the butcher's employees. The court decided that, since there was no relation between the injury and fault on the part of the employer, there could be no liability. Up to the passage of workmen's compensation legislation, in England and America the employer was not liable to an employee for injury caused by a fellow employee.

Summary.—In the absence of statute, then, the employer is liable to his employee for damages for injuries received, only (1) if the injury was occasioned by the employer's negligence; (2) if the employee was himself not negligent; (3) if the accident was not due to the negligence of a fellow employee; and (4) if the accident was not one foreseeable as a hazard of the employment. In the event that any one of these conditions are lacking, the loss occasioned by the injury is borne entirely by the workman.

2. EMPLOYER'S LIABILITY UNDER STATUTES

With the tremendous growth of cities and manufacturing, the common-law doctrine of employers' liability for negligence, with its defenses of contributory negligence, fellow-servants' negligence, and assumption of risk, became inadequate and inapplicable to modern conditions of employment. It began to be recognized that industrial accident loss should no longer be borne solely by the individual; that it was as much a charge upon the industry itself as the consumption of fuel and materials. Like any other item of the cost of production, loss of human power should enter into the cost price of the manufactured article, ultimately to be charged to the consumer, and the loss thus spread over society as a whole.

Federal Employers' Liability Statutes.—The national government was the first to change the common law doctrine by statute. Federal jurisdiction, however, extends only over interstate commerce; and it is only those employers and employees engaged in interstate commerce whose rights and liabilities are governed by the federal employers' liability statutes. 45 U.S.C.A. §§ 51–60.

Moreover, the legislation passed by Congress on this subject went only part way in changing the common-law doctrine as to employers' liability. Although it abolishes the common-law defenses of contributory negligence, fellow-servant rule, and assumption of risk, it still leaves the element of negligence of the employer as an essential to the worker's right of recovery. For an employee engaged in interstate commerce to recover from his employer for an injury received in the employment, he still must prove that the injury was due to the employer's negligence.

The State Workmen's Compensation Statutes.—State investigations into the subject of industrial accident loss revealed the fact that in more than 80 per cent. of cases of injury to workmen arising out of the employment, the employer was not legally liable, and the employee received nothing in compensation for his loss. Recognizing that common-law principles were no longer adequate to deal with the modern situation, that in most cases the injured workmen and their families became objects of charity, and that industrial accident loss is properly a charge upon the cost of production of the manufactured article, beginning in 1910 the Legislatures of nearly all of the states passed workmen's compensation statutes, doing away entirely with the common-law rules of liability, and establishing new rules, new remedies, and new procedure.

In a later chapter, the subject of liability of the employer under the Workmen's Compensation Statutes is considered in detail.

When Common-Law Action Remains.—Even under compensation statutes, however, if the particular employment is not one covered by the act, the rights and liabilities of the parties are governed by the common-law doctrines as herein outlined.

SALES

Chapter

1. Nature and Form of the Contract of Sale.
 2. Transfer of Title in Sales of Ascertained Goods.
 3. Transfer of Title in Sales of Unascertained Goods.
 4. Rights and Remedies of the Buyer.
 5. Warranties.
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CHAPTER 1

NATURE AND FORM OF THE CONTRACT OF SALE

A contract to sell goods is a contract whereby the seller agrees to transfer the title to the goods to the buyer for a consideration called the price.

A sale of goods is an agreement whereby the seller transfers the title to the goods to the buyer for a consideration called the price.

In general, no better title can pass than the seller has.

Contract of Sale Defined.—A sale is the transfer of the ownership in goods for a price. Ownership is the sum total of rights in relation to an object held by one person to the exclusion of all others. By goods is meant commodities or merchandise.

Distinction Between Sale and Contract to Sell.—In a present sale there is an actual transfer of the title or ownership in the goods to the buyer. In a contract to sell, however, there is merely an enforceable agreement that at some future time the title or ownership shall be vested in the buyer. The importance of the distinction is obvious. If the contract is of a present sale, and the title has passed to the buyer, any subsequent loss or damage to the goods must fall upon him, because he is the owner of them. If, however, the contract is one of future sale, the seller being still the owner of the goods any loss or injury to them must fall upon him.

Sales a Branch of the Law of Contracts.—A sale of goods is a contract, and the fundamental principles of the law of contracts

governs the transaction. All the requisites to a binding contract are essential to constitute a sale, offer and acceptance, consideration, capacity, legality, reality of consent, etc. Since we have previously studied these matters, a repetition will be unnecessary.

The law of sales, as a branch of the law of contracts, deals particularly with the question as to when title passes and the special remedies for breach of warranty of the goods sold. The Uniform Sales Act is a codification of the law on the subject. Approved by the Commission on Uniform State Laws, in 1926, it has since been adopted as part of the statute law of most of the states. The matter that follows has been written with reference to this act.

What Title Passes by a Sale.—The general rule is that a person can convey no better title than he has. A thief or finder gets no title to goods which thus come into his possession, and therefore he can convey none; and, no matter how long the list of innocent purchasers through whose hands the goods pass, the owner, from whom the articles were stolen or who lost them, may nevertheless recover possession, provided he can prove their identity. The law places the burden upon the buyer to make sure that the person about to sell him goods has good title to them.

The chief exception to this rule applies to money and negotiable instruments, as already explained. Another exception applies to negotiable bills of lading and warehouse receipts. These documents are symbols of title to the goods which they represent, and like a negotiable note or bill of exchange may be negotiated by a thief or finder, so as to give a good title to an innocent purchaser.

When Title Passes.—Probably the most important problem with which the law of sales deals is the determination of the time when title to the property passes from the seller to the buyer. In the determination of this question all contracts of sale are first classified according to whether they fall into one or the other of two categories, and next the rules applicable to the particular category are applied, from which the solution is reached. These two categories are: (1) Contracts to sell ascertained goods; and (2) contracts to sell unascertained goods. In the two chapters following we shall consider the rules governing each category, and their application.

What are Ascertained and Unascertained Goods?—All goods are either ascertained or unascertained. Goods are ascertained, where the parties know the certain, specific article to be sold. An example would be where the seller, pointing to the object which is before them, offers to sell it to the buyer. Or where A says to B: "I will sell you my automobile." If A has two automobiles, so far at least the goods are unascertained; but, if, in such case, A had gone on and in some manner identified which of the two was to be sold, the contract would have been of ascertained goods. The test is whether or not the subject-matter of the sale is by the agreement of the parties clearly identified.

Uniform Sales Act.—The law governing sales of goods in the majority of states in the United States is codified in a uniform act adopted in thirty-six states and in Hawaii and Alaska. The treatment of the subject herein is based upon this statute.

Form of Contract of Sale.—Except for those sales within the operation of the Statute of Frauds, the agreement may be oral, or it may be implied from the conduct or acts of the parties. The vast majority of sale transactions are not evidenced by a writing. However, of all contracts for the sale of goods above the value of five hundred dollars the law requires either:

- (1) Earnest or part payment; or
- (2) Acceptance and receipt by the buyer; or
- (3) A written memorandum of the contract.

The Uniform Sales Act, § 4, provides as follows:

"A contract to sell or a sale of any goods or choses in action of the value of five hundred dollars (or other amount stated in state statute) or upwards shall not be enforceable by action unless the buyer shall accept part of the goods or choses in action so contracted to be sold, or sold, and actually received the same, or give something in earnest to bind the contract, or in part payment, or unless some note or memorandum in writing of the contract or sale be signed by the party to be charged or his agent in that behalf."

"The provisions of this section apply to every such contract or sale notwithstanding that the goods may be intended to be delivered at some future time or may not, at the time of such contract or sale, be actually made, procured or provided or fit or ready for delivery, or some act may be requisite for the making or completing

thereof, or rendering the same fit for delivery; but if the goods are to be manufactured by the seller especially for the buyer and are not suitable for sale to others in the ordinary course of the seller's business, the provisions of this section shall not apply."

"There is an acceptance of goods within the meaning of this section, when the buyer, either before or after delivery of the goods, expresses, by words or conduct, his assent to becoming the owner of those specific goods."

"* * * Where the goods are to be manufactured by the seller for the buyer and are not suitable for sale to others in the ordinary course of the seller's business, the provisions of this section shall not apply."

(1) WHAT ARE GOODS, WARES, AND MERCHANDISE?

BROWN & HAYWOOD CO. v. WUNDER.

Supreme Court of Minnesota, 1896. 64 Minn. 450, 67 N.W. 357, 32 L.R.A. 593.

CANTY, J. This is an action for damages for loss of plaintiff's anticipated profits, caused by the breach by defendant of an executory agreement between the parties. Defendant was about to bid for a contract to rebuild a burnt portion of a building in Minneapolis, and received from plaintiff the following proposition to furnish the glass for the same: "Minneapolis, Minn., Feb. 6th, 1894. John Wunder, Esq., City—Dear Sir: We will furnish all plate glass, double-strength glass, beveled plate, set in metallic sash, and crystalline glass, as per plans and specifications, for the burnt portion of the Syndicate Block, set complete in place, for thirty-one hundred dollars. This includes glass for water closets and crystalline glass in skylights; also, mirrors around show-window posts. Yours faithfully, Brown & Haywood Co." The evidence tends to prove that defendant then and there orally promised plaintiff that, if he should be awarded the contract to reconstruct such portion of the building, and plaintiff's bid for the glass work was the lowest received by him, he would award the glass work to plaintiff; that the contract for reconstruction was so awarded him, and plaintiff's bid for the glass work was the lowest, but that he refused to permit plaintiff so to furnish the glass work, and let the furnishing of the same to others. On the

trial the jury found for plaintiff in the sum of \$325, and from an order denying a new trial, defendant appeals.

The only question raised on this appeal is that defendant's verbal promise to award the contract for the glass work to plaintiff is void under the statute of frauds. Gen.St.1894, § 4210, provides: "Every contract for the sale of any goods, chattels or things in action for the price of fifty dollars or more, shall be void, unless—First, a note or memorandum of such contract is made, in writing, and subscribed by the parties to be charged therewith," or unless there has been a part performance. It is contended by appellant that this contract is one for the sale of goods and chattels, and therefore within the statute. We cannot so hold. In our opinion, it appears, from the evidence, to be a contract for the manufacture of articles of special and peculiar design, not suitable for the general trade. Such a case is not within the statute. Browne, St.Frauds, §§ 304, 305, 307, 308; 1 Reed, St.Frauds § 247; Phipps v. McFarlane, 3 Minn. 109 (Gil. 61). The testimony tends to prove that in the usual course of business, the glass is carried in stock in sheets of standard sizes, and is cut up to fit the particular sash frames. The witness Brown testified: * * * "The beveling is the important item. * * * In regard to the item of \$431 for the beveled plate, the labor in that particular item would, perhaps, be \$300. In regard to the item of chipped glass of \$450, the labor would, perhaps, cost from \$100 to \$150. We estimated the work of setting all the glass in the building to be \$200. * * * The performance of the contract required us to come there and put these plates of glass in the apertures or frames that were prepared by the contractors. * * * As regards the plate glass, the sash are usually in place in the building so that, when the glass is put in, the building is inclosed. * * * In my estimate I figured the plate glass at \$671, and that included ten per cent. for cutting and waste."

Not only was this a contract to manufacture articles of a special and peculiar design, not suitable for the general trade, but it appears from the contract that the glass was to be "set complete in place." Then it was a contract to make improvements on the land, to erect portions of a building attached to the realty, not to sell chattels. Such a contract is not within the statute. Benj.Sales, 6th Ed., § 108.

This disposes of the case, and the order appealed from is affirmed.¹

(2) WHAT IS RECEIPT AND ACTUAL ACCEPTANCE?

Receipt and acceptance of the goods orally contracted for takes the case out of the statute of frauds, i. e., does away with the necessity of a writing. Each is distinct and separate from the other, and both are necessary. Acceptance may precede receipt, or vice versa. Both may be subsequent to the contract of sale.

Acceptance is an assent by the buyer to become the owner of the goods. If the contract is for sale of specific goods—ascertained existing goods—acceptance usually takes place when the contract is made. If the goods are not specific—are not in existence or clearly designated as the subject matter of the contract—there can be no acceptance until the seller indicates he intends to deliver, and thereafter an acceptance can be shown by the buyer's declarations, or by any dealing with them as owner.

Where acceptance has taken place a liberal construction is placed on actual receipt. Receipt implies delivery, and must be with the seller's consent, and with the intention of transferring possession to the buyer as owner. When the goods are delivered to the buyer or his agent, there is, of course, an actual receipt. An actual receipt takes place by agreement, without physical delivery: (1) Where the seller holds the goods as bailee for the buyer; (2) when the buyer holds the goods as bailee for the seller, and if with the seller's consent he ceases to hold as bailee and holds as owner; (3) when a third person holds the goods as bailee of the seller, and, with the consent of the buyer and seller

¹ Whether an agreement should be considered as a contract for the sale of goods, within the meaning of the Statute of Frauds, or a contract for labor and materials, and therefore not within that statute, is often a difficult question. A contract for the sale of articles then existing, or such as the seller ordinarily manufactures for the trade although not at the time existing, is a contract for the sale of

goods to which the statute applies. But where the goods are to be manufactured in the future, to the special order of the buyer and particularly for him, the case is not within the statute, for the contract is not for the sale of goods but of labor and materials. Building contracts are therefore not within the operation of the Statute of Frauds.

he becomes the bailee of the buyer; (4) when the goods are not in possession of any person, as goods at a public wharf, and the buyer and seller agree that the possession is transferred.

GABRIEL v. KILDARE ELEVATOR CO.

Supreme Court of Oklahoma, 1907. 18 Okl. 318, 90 P. 10.

Action by the Kildare Elevator Company against Joseph Gabriel. Judgment for plaintiff, and defendant brings error.

BURFORD, C. J. * * * The cause of action is one to recover damages for the breach of an oral agreement to deliver corn. The plaintiff below, the Kildare Elevator Company, alleged that it entered into an oral agreement with the defendant Gabriel, by which he agreed to sell and deliver to the Kildare Elevator Company 200 bushels of ear corn at 30 cents per bushel, and 1,000 bushels of shelled corn at 31 cents per bushel; that pursuant to said agreement Gabriel delivered 52 bushels of corn, which was accepted and paid for at the agreed price; that Gabriel then refused to deliver any more of the corn, although the company was able, ready, and willing to take and pay for the same; that the plaintiff was damaged by such failure in the sum of \$100, for which judgment was prayed. The cause was tried to a jury in the district court and a verdict was returned in favor of the plaintiff and judgment entered for \$55 and costs. This proceeding is to reverse that judgment.

The plaintiff in error contends that the petition is fatally defective for two reasons: First, that the contract was within the statute of frauds, and the subsequent delivery and acceptance of part of the corn did not operate to take the contract out of the statute; and, second, that no sufficient allegations of damages are set out to entitle the plaintiff to recover. We think there is no merit in either contention. Our statute (section 780, Wilson's Rev. & Ann. St. 1903, p. 312, 15 Okl. St. Ann. § 136) provides: "The following contracts are invalid, unless the same or some note or memorandum thereof be in writing and subscribed by the party to be charged, or his agent. * * * Fourth: An agreement for the sale of goods, chattels, or things in action, at a price not less than fifty dollars, unless the buyer accept or receive part of

such goods and chattels, or the evidences or some of them, of such things in action, or pay at the (time) some part of the purchase money. * * *

This provision has been construed by almost every American court of last resort, and the authorities are uniform, to the effect that a delivery of any portion of the goods or chattels contracted for at any subsequent time and their acceptance makes the contract an enforceable one. In 1 Mecham on Sales, § 401, it is said: "It is not essential that the part delivery, acceptance, and receipt should be at the time of making the contract. The parole agreement, unless revoked, may stand for a mutual agreed proposition, at least for a reasonable time, where none is fixed, and the subsequent acceptance and receipt, while the proposition remains open, of a portion of the goods which were the subject of the parole negotiation, will make the entire contract effective."

In Rickey v. Tenbroeck, 63 Mo. 563, the contract was an oral one for the sale of a lot of cattle, part to be delivered in one week and the remainder in installments as the buyer might require; and the court held that, though the contract was void under the statute, it was a good proposition concerning the price and the subsequent delivery and acceptance of the first installment without any change in the agreement made it binding, and took it out of the statute. In Farmer v. Gray, 16 Neb. 401, 20 N.W. 276, the court held that, where the contract is entire, the acceptance and receipt of a part of the goods will validate the entire contract. In Gilbert v. Lichtenberg, 98 Mich. 417, 57 N.W. 259, there was a sale of three car loads of onions, and it was held that the delivery and acceptance of one car load after the contract was made satisfied the statute as to the whole transaction. In Slater Brick Co. v. Shackleton, 30 Mont. 390, 76 P. 805, the Supreme Court of Montana said: "The receipt and acceptance of the property sold need not be concurrent with the time of sale, but may occur at any time thereafter." Also: "If the defendants took the place of White & Co., and received and accepted a portion of the goods and paid a portion of the price, the contract was equally placed beyond the statute. The Supreme Court of Idaho in Coffin et al. v. Bradbury et al., 3 Idaho 770, 35 P. 715, 95 Am.St.Rep. 37, said: 'Receipt and acceptance of the property sold at any time after making the contract takes the contract out of the statute of frauds.'" * * *

The acceptance and receipt need not be contemporaneous with the making of the agreement, but may take place at any time before the contract is sought to be enforced. * * *

[Judgment affirmed.]

(3) WHAT CONSTITUTES PART PAYMENT?

Part payment is earnest money, or some gift or token paid to and accepted by the seller to bind the bargain. The payment may be subsequent to the contract, unless the local statute provides otherwise. It need not be money, but may be anything of value which by mutual agreement is given and accepted in part satisfaction of the price. It may not, however, be in the form of a credit on indebtedness of the seller.

GROOMER v. McMILLAN.

Kansas City Court of Appeals, Missouri, 1910. 143 Mo.App. 612, 128 S.W. 285.

ELLISON, J. Plaintiff brought this action to charge defendant with damages on account of a breach of a contract of sale of cattle. He recovered judgment in the trial court.

The contract was verbal, and the cattle largely exceeded the value of \$30. For that reason defendant interposed the statute of frauds (section 3419, Rev.St.1899, Mo.R.S.A. § 3355), which provides that no verbal contract for the sale of goods, wares, and merchandise, for a price of \$30 or more, shall be allowed to be good unless the buyer shall accept part of the goods so sold and actually receive the same, or give something in earnest to bind the bargain, or in part payment. But plaintiff claims that he made a payment at the time of making the contract, by giving to defendant his check on a bank for \$100. His testimony on this head was as follows: "I came back to where he (defendant) was plowing corn, and told him I would take the cattle, and would state the contract over so there would be no mistake; I was to have the cattle at my request the last half of September, any time I called for them after the 15th. They were to be driven to Mr. John Graham's and weighed, at \$4 per hundred, the shrink to be 3 per cent. He, (defendant) said, 'Yes.' I wanted to know if a check for \$100 would be money enough, and he said it

would. I wrote him out a check for \$100 and put on the check, 'For twenty steers.' I asked him if that check was all right, and he said it was. Then I turned back and come home." Defendant kept the check for several weeks, and finding he and plaintiff were at a misunderstanding as to the obligations of the contract, he tore it up in plaintiff's presence and threw the pieces on the ground.

In our opinion this evidence did not show a payment. The law is that the payment, to be effective in avoidance of the statute of frauds, must be an absolute payment. But it need not be in money. The buyer's check for the money will suffice if it is received by the seller and agreed that it is an absolute payment; and this must be clearly established. For "nothing is better settled than that a check is not payment, but is only so when the cash is received on it." * * * A note given for the amount of an account will not extinguish the latter unless there is an express agreement that it shall so operate. [Cases cited.]

From the foregoing it is plain that the burden was upon the plaintiff to clearly show that it was expressly agreed by defendant that the check was taken as an absolute payment and discharge of the price of the cattle pro tanto. It is equally clear that the acceptance of the check and holding it (there being no loss to plaintiff by reason of such holding) does not establish an agreement that it was considered a payment in fact. * * *

The statute requires that there shall be a payment on the price. And it must be remembered that this is a requirement of the law as a matter of public policy, and it can neither be waived nor evaded by the parties. If the creditor accepts something other than money, it must be agreed and understood that it is in absolute payment and discharge of the price. Otherwise the statute is of no force or effect. A seller of personal property desiring to make a valid contract under the provision of the statute of frauds, with a buyer who has no money with him, might expressly agree with the latter to take his check in absolute discharge of that much of the purchase price. But, if he did so, he would have to take the risk of getting the money, provided, of course, the buyer had funds and a right to draw the check at the time he delivered it. For if he had no right to draw it, that would be a fraud on the seller, and his agreement to accept it as a discharge of the debt would be avoided. * * *

Plaintiff insists that the check, if not a part payment, was at least "something in earnest to bind the bargain." We think not. Whatever may have been the meaning of the word "earnest," its statutory meaning is part payment. Howe v. Hayward, 108 Mass. 54, 11 Am.Rep. 306; Hudnut v. Weir, 100 Ind. 501. "It must be a real payment." 1 Reed, Statute of Frauds, § 229. "Earnest" seems understood to be a part of the price. So Blackstone (Book 2, 447) says the sale is not good unless the vendee "gives part of the price to the vendor by way of earnest to bind the bargain."

Plaintiff also suggests that "live cattle" are not embraced within the statutory words "goods, wares, and merchandise." We think they are.

From the foregoing observations it would seem to be apparent that the evidence wholly failed to show such an acceptance of the check as the law requires, and the judgment is therefore reversed. All concur.

CHAPTER 2

TRANSFER OF TITLE IN SALES OF ASCERTAINED GOODS

Section

1. General Rule—Title Passes According to Intention.
 2. Presumptions as to When Title Passes Where Intention Not Expressed.
 3. Conditional Sales.
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SECTION 1.—GENERAL RULE—TITLE PASSES ACCORDING TO INTENTION

Where there is a contract to sell specific or ascertained goods, the property in them is transferred to the buyer at such time as the parties intend it to be transferred.¹

For the purpose of ascertaining the intention of the parties, regard shall be had to the terms of the contract, the conduct of the parties, usages of the trade, and the circumstances of the case.

Where the goods are ascertained, the expressed intention of the parties alone controls; title passes at the time they have declared that it shall pass. In many cases, however, the parties fail to declare their intention on this subject. It is then for the court to determine their intention from an examination of the terms of the contract, the usage of the trade or business, and the circumstances of the particular case.

There are a large number of instances in which the parties not only have omitted to declare their intention as to the moment title is to pass, but have neglected to consider that detail at all, so that they actually have no intention. Wherever, then, the court is unable to determine from the evidence the intention of the parties, it applies certain fixed legal presumptions as to intention. These rules of presumption, as stated in section 19 of the Sales Act, are five in number, the first three of which relate to contracts to sell specific or ascertained goods.

¹ Uniform Sales Act, § 18.

SECTION 2.—PRESUMPTIONS AS TO WHEN TITLE PASSES WHERE INTENTION NOT EXPRESSED**(1) TITLE TO SPECIFIC GOODS IN A DELIVERABLE STATE PASSES WHEN CONTRACT IS MADE**

Unless a different intention appears, the following are rules for ascertaining the intention of the parties as to the time at which the property in the goods is to pass to the buyer:

Rule 1. Where there is an unconditional contract to sell specific goods, in a deliverable state, the property in the goods passes to the buyer when the contract is made, and it is immaterial whether the time of payment, or the time of delivery, or both, be postponed.

Rule 2. Where there is a contract to sell specific goods and the seller is bound to do something to the goods for the purpose of putting them into a deliverable state, the property does not pass until such thing be done.²

In order for title to pass, by Rule 1, at the time the contract of sale is made, it must clearly appear that the parties are in accord as to the identification of the specific goods to be sold, and that no condition to the buyer's agreement to accept be imposed. If either seller or buyer is by the contract bound to do anything as a condition upon which the passing of the title depends, the property will not pass until the condition be fulfilled, even though the goods have been delivered to the buyer.

If anything remains to be done by the seller of specific goods to put them into a deliverable state, title to the goods does not pass at the time of the contract. The vendee may reject the goods as not being those contracted for, in case the vendor does not do the things necessary to put them into a deliverable shape. However, a clear contrary intent will be given effect, since the foregoing is merely a presumption to be used when no intent appears.

Title passes even though goods have to be weighed, measured or counted to *ascertain price*. But if such acts, or any of them,

² Uniform Sales Act, § 19.

are necessary to ascertain the goods which are the subject matter of the contract, title does not pass until the requisite act is done.

PULKRABEK v. BANKERS' MORTGAGE CORPORATION.

Supreme Court of Oregon, 1925. 115 Or. 379, 238 P. 347.

[Action by J. E. Pulkrabek against the Bankers' Mortgage Corporation for damages for breach of an executory contract to sell mill machinery. The machinery was installed in a mill owned by defendant at Sherwood, Oregon. Defendant contracted to have the machinery dismantled and shipped to plaintiff at White Salmon, Washington, where plaintiff was building a similar mill. The agreed price was \$8,000 which plaintiff paid in advance. The bank failed to perform its part of the contract in that only a part of the machinery was loaded on the cars within the time stipulated, and no certificate of a test of the boiler, as required by the contract, was ever furnished to plaintiff.

As verdict and judgment was rendered below in favor of the plaintiff for the \$8000 paid and for \$1600 damages, from which judgment the defendant appealed.]

RAND, J. * * * Defendant's principal contention is, that under the bill of sale and contract, the property in the machinery and equipment passed to plaintiff upon the execution of these instruments and the delivery of the bill of sale, and that, as delivery of a part of the chattels has been made, plaintiff could not rescind the contract without returning or offering to return the delivered chattels, and that, since there was no such return or offer to return, plaintiff's right of recovery fails.
* * *

Before referring to the statute and applying it to the agreement of the parties, we refer to the true rule defining the duties of the buyer and the circumstances under which he is compelled to return or offer to return property received under a contract of sale in a case where the goods are rejected because they are not what the contract requires which is stated by Mr. Williston as follows:

"Where the buyer rejects goods because they are not what the contract requires he is under no obligation to return them;

he may simply refuse to regard them as his. But when the property in the goods has passed and the buyer wishes to revest the property in the seller a return or offer to return the goods is necessary." 2 Williston on Sales, 2d Ed., § 610.

Section 8181, Or.L., which is section 18 of the Uniform Sales Act, provides that:

"(1) Where there is a contract to sell specific or ascertained goods, the property in them is transferred to the buyer at such times as the parties to the contract intend it to be transferred. (2) For the purpose of ascertaining the intention of the parties, regard shall be had to the terms of the contract, the conduct of the parties, usages of trade and the circumstances of the case."

Section 8182, Or.L., prescribes the rules for ascertaining the intention of the parties as to the time when the property in the goods passes to the buyer, unless a different intention appears. Rules 1, 2, and 5 thereof prescribe as follows:

"1. Where there is an unconditional contract to sell specific goods, in a deliverable state, the property in the goods passes to the buyer when the contract is made, and it is immaterial whether the time of payment, or the time of delivery, or both, be postponed. * * * 2. Where there is a contract to sell specific goods and the seller is bound to do something to the goods, for the purpose of putting them in a deliverable state, the property does not pass until such thing be done. * * * 5. If the contract to sell requires the seller to deliver the goods to the buyer, or at a particular place, or to pay the freight or cost of transportation to the buyer, or to a particular place, the property does not pass until the goods have been delivered to the buyer or have reached the place agreed upon."

Under these statutory provisions, the intention of the parties to a contract for the sale of specific goods, such as are involved here, is controlling upon the question of when the title to the goods passes if such intention can be collected from the terms of the contract itself or from the conduct of the parties, the usages of trade, or the facts and circumstances of the case. But, if such intention cannot be determined by those means, then the rules provided by the statute for making such determination are controlling. * * *

The provisions of the contract differ very materially from the above provision of the bill of sale. At the time these papers were executed the machinery and equipment in question were attached to and formed a part of what was known as the Tappendorf mill near Sherwood, Or. The contract did not contemplate the sale of the mill building, nor of the mill itself as a whole, but only the parts designated in the bill of sale. Before these parts could be delivered by defendant to plaintiff it was necessary to remove them from the mill. Until detached and removed they were not in a deliverable state. The contract required the defendant to dismantle the Tappendorf mill, to haul the machinery and equipment to the railroad, and there load it on board cars, prepay the freight thereon, and cause it to be shipped to White Salmon, Wash. * * *

The provisions of the Uniform Sales Act, to which we have referred, would, under such circumstances, prevent the property in the machinery and equipment from passing until the defendant had performed all the labor upon said chattels that the contract required it to perform, unless the parties agreed that the title should pass before said labor was performed. There was no such agreement, and there are no circumstances from which such an intention can be inferred, and hence the provisions of the Uniform Sales Act are controlling. Since, therefore, the defendant was bound to do something to the goods for the purpose of putting them in a deliverable state, the property did not pass, under rule 2 of section 8182, until defendant has performed all that it was required to do under the contract for the purpose of putting them in a deliverable state; and, under rule 5, since it was required by the contract, after loading the chattels upon the cars, to pay the freight to White Salmon, Wash., the property in the machinery and equipment could not pass to plaintiff until it had reached the place agreed upon. * * *

ABRAHAM v. KARGER.

Supreme Court of Wisconsin, 1898. 100 Wis. 387, 76 N.W. 330.

PINNEY, J. This was an action for the recovery of a lot of merchandise stored by the defendant, Karger, at No. 559 East Water street, Milwaukee, and in charge of one Bing, a relative of Karg-

er, to sell for him on commission. The plaintiff, Clara Abraham, was at this time conducting a business under the name of the "Milwaukee Knitting Works." This business was managed for her by her father, Louis Abraham, as her agent, who a few days prior to August 26, 1896, began negotiations with Bing for the purchase of the merchandise belonging to the defendant, Karger. These negotiations were in part conducted, according to the evidence of the plaintiff, Abraham, in the presence of, and with the sanction of, the defendant, Karger. There was a dispute between the witnesses for the plaintiff, on the one side, and the defendant and his witnesses, on the other, as to the terms of sale finally agreed on between the plaintiff and defendant. On the part of the plaintiff, Louis Abraham testified that the agreement as finally made was that the plaintiff was to pay the defendant, Karger, for this stock \$2,000 in cash, and to deliver to him the note of one W. A. Meyer for \$500; and this was corroborated by the evidence of James L. Gates, a witness on the part of the plaintiff, who testified that the defendant, Karger, stated to him that such was the case. The testimony of Karger and his witnesses was that the plaintiff was to pay to the defendant \$2,500 in cash, and that Karger did not agree or consent in any way to accept the note of Meyer in payment of part of the consideration; and it appeared that this dispute as to the terms of the sale was the only matter upon which there was any conflict of testimony. On all other points the witnesses substantially agreed.

At the time when the bargain was made, Louis Abraham paid Bing \$25 to bind the bargain. The next day, the plaintiff, Abraham, paid to Bing \$1,500, and at the time Bing gave to Abraham an invoice or statement drawn up in Bing's handwriting, which recites the value of the merchandise at \$4,100, the payment by cash and merchandise in exchange of \$3,100; the balance of \$1,000 to be paid, \$500 in cash, and \$500 in W. A. Meyer's note. Both Bing and Abraham admit that the purchase price was \$2,500, and that no merchandise was given in exchange; that the bill or invoice was made out this way as a matter of convenience between the parties. And Bing further claims that the statement that the balance was to be \$500 in cash and \$500 in notes did not express the true understanding between them. August 24th, the plaintiff, through Louis Abraham, paid \$500

more on the purchase; and, on the 26th of August, Louis Abraham tendered to the defendant Karger, Meyer's note for \$500, payable to the Milwaukee Knitting Works, and indorsed, "C. Abraham, Proprietor." This tender was refused, and Karger said to Abraham, "If you don't have the money before noon, I am going to store the goods, and you will have to pay the costs;" whereupon the plaintiff, Clara Abraham, brought replevin, charging the unlawful and wrongful detention of the property.

The court, in its charge to the jury, in effect told them that the question at issue was whether the sale was to be for cash and notes, as testified to by the plaintiff's witnesses, or for cash solely, as testified to by the defendant and his witnesses, that, if they found the claim of the plaintiff to be correct, then the verdict should be in favor of the plaintiff; if they found the facts as to the sale or agreement to be as claimed by the defendant, then they should find for the defendant. The jury found for the plaintiff, and that she was the owner of, and entitled to the possession of, the goods seized under the writ; that the same were unlawfully detained from her by the defendant; that the value of the property was \$3,500. The plaintiff had judgment against the defendant for the possession of the property, and for the recovery of the costs, together with the damages of 6 cents. * * *

There was evidence on the part of the plaintiff to maintain these contentions. It is established by the verdict as a verity that payment of the \$2,000 in money, and tender of the note of Meyer for \$500, were made. Such payment and tender of payment prior to the time of the commencement of the action had the same effect as actual payment upon the rights of the parties. There is nothing to show that the contract was executory, so far as anything remaining to be done to the goods was concerned. The evidence shows that they were ready for delivery, and set apart, and the price agreed upon, and a partial delivery made before the tender of the \$500 note. The goods were in the sight of the parties, and were pointed out in the presence of Karger, the defendant, when it was agreed that he was to get \$2,000 in cash and W. A. Meyer's note for \$500 for them. There can be no doubt but that, under the circumstances stated, the title to the goods, and the right of possession as well,

passed to the plaintiff, and, if afterwards they were wrongfully detained, she might maintain replevin for them. "When the terms of sale are agreed on, and the bargain is struck, and everything the seller is to do with the goods is complete, the contract of sale becomes absolute as between the parties, without actual payment or delivery, and the property and the risk of accident to the goods vests in the buyer. He is entitled to the goods on payment or tender of the price, and not otherwise, when nothing is said at the sale as to the time of delivery or time of payment. * * * But if the goods are sold upon credit, and nothing is agreed upon as to the time of delivery of the goods, the vendee is immediately entitled to the possession, and the right of property vests at once in him." 2 Kent, Comm., 9th Ed. 671. * * * The evidence as to what actually did occur, or what was agreed on between the parties, is in some respects conflicting and contradictory. The case was rightly submitted to the jury to find upon the vital point in dispute, and thus determine whether the property and right of possession passed to the plaintiff. The evidence was clearly sufficient to sustain the finding of the jury, and the court could not have properly directed a verdict for the defendant. * * *

A discussion of the evidence contained in the printed case would serve no useful purpose. For these reasons, the judgment of the superior court of Milwaukee county must be affirmed. Judgment is ordered accordingly.

RAIL v. LITTLE FALLS LUMBER CO.

Supreme Court of Minnesota, 1891. 47 Minn. 422, 50 N.W. 471.

[Action on a contract of sale of timber. The evidence shows that, after the agreement of purchase was entered into between the parties, but before delivery to the buyer, the logs which were the subject-matter of the contract were destroyed by fire. Plaintiff, the seller, maintains that the risk of loss was upon the buyer, for the reason that title passed at the time of the contract of sale. The issue was joined on whether or not title had passed. The said contract was as follows: "I, Case Rail, hereby sell to the Little Falls Lumber Company, 247 logs, marked 'C. R.' and stamped 'C. R.' and scaling 61,300 feet, at \$7 per thousand

feet, to be delivered by me in the Mississippi river, the same being now," etc. "Payments to be made as follows." (Here the installments to be paid were set out.)

COLLINS, J. The single question here presented is whether the contract entered into between these parties was an executed one, or simply executory. If the former, the title to the logs * * * vested in the vendee corporation; the risk attendant upon the title and the subsequent loss * * * must be borne by it, unaffected by the fact that the vendor was to make delivery in the Mississippi river.

There is a seeming confusion in the decisions as to when the title to personal property does pass on sale, but it has arisen out of a failure clearly to distinguish between general contracts for the sale of chattels, of a certain kind and contracts for the sale of chattels, specifically ascertained and identified. [In the latter case there can be no doubt but that title passes at the time of the contract.] In the case at bar there should be no doubt upon the undisputed facts, that the title vested in the vendee at the date of the agreement. All of the vendor's logs, lying at a certain point, * * * the same being duly marked and scaled, were included in the writing. * * * [The subject-matter of the contract being ascertained by the agreement, and the goods being in a deliverable condition, in every respect it was a completed contract, and the assent of both parties that title should pass was obvious. Since title had passed, the loss was upon the purchasers, and plaintiff's action for the deferred installments must be sustained.]

J. B. BRADFORD PIANO CO. v. HACKER.

Supreme Court of Wisconsin, 1916. 162 Wis. 335, 156 N.W. 140.

[Action by the J. B. Bradford Piano Company against Bertha Hacker. From a judgment for defendant, plaintiff appeals. This is an action to recover the purchase price of a Conover inner player piano sold by the plaintiff to the defendant. * * * At the time the contract was entered into defendant finally showed a preference for one and agreed to take it provided the case would be stained a certain darker color and the tone made

more brilliant, which was agreed to. * * * An order was duly sent, confirming the verbal order, dated April 4, 1914. On April 7, 1914, the defendant sent a letter to the Bradford Piano Company repudiating the contract. The Bradford Company on May 2, 1914, made a tender of delivery of the piano as refinished. At the time of the trial the piano was in the warerooms of the Bradford Company. * * * The trial court directed a verdict for the defendant.]

SIEBECKER, J. The trial court held that the facts and circumstances show, as matter of law, that the property in the piano was not transferred to Miss Hacker at the time the written order for the purchase was given nor prior to the time Miss Hacker repudiated this contract on April 7, 1914. The plaintiff assails this holding of the trial court upon the ground that, on the evidence, it was a question for the jury to determine whether or not the parties to the contract intended that the property in the piano was transferred prior to the time defendant repudiated the sale. The evidence shows that defendant and plaintiff's agent negotiated for the sale on April 2, 1914, at the factory of the Cable Company in the city of Chicago, where the defendant selected the piano in question. It appears that she was not satisfied with the color of the case of the instrument she selected, and insisted on having the color altered and made darker. The manufacturer agreed with plaintiff and defendant to alter the color so as to comply with the understanding of the parties, to regulate the tone of the instrument as defendant desired it, and to insert the player action and test it, as is usually done before sending instruments from the factory to customers. The sale price and the shipment of the instrument by railroad to Hartford, Wis., by the plaintiff were agreed upon by plaintiff's agent and defendant, as specified in the written memorandum of sale set out in the above statement. The defendant signed this memorandum at the depot in Chicago. The evidence shows that the piano was returned to the varnishing department of the factory, and a color coat of varnish applied to bring the color to the shade desired by the defendant. After this coat had dried two more coats of regular varnish were put on, which, when properly dried, completed the piano so that it was ready for shipment. This process took from two to three weeks, when the instrument was boxed and shipped. Defendant repudiated

the contract on the fifth day from the date of sale. The facts and circumstances show that the piano was not in a deliverable condition at any time up to the date of the repudiation on April 7, 1914. The contract also required the shipment of the instrument from Chicago to Hartford, Wis., which could not be done, and in fact was not attempted to be done, within two weeks or more after the sale. The conduct of the parties at the factory and in negotiating the sale, when taken in connection with the terms of the contract and the circumstances of the case, fail to show that it was mutually understood and intended that the property in the instrument should pass to defendant at this time. It is plain that the defendant had no control of nor any dominion over the instrument while in the factory, and that the Cable Company retained full control and possession to deal with the property as its own. The evidence, showing the entire transaction, does not permit of the inference that the parties mutually intended that the property passed to defendant under the agreement of sale of the instrument, as contemplated by the provisions of [section 19, rule 2, of the Sales Act]. * * *

It is obvious that the piano was not in a deliverable state until the coloring of the case had been altered to comply with the conditions of the sale within the contemplation of this statute, and hence the property had not passed when defendant repudiated the sale. * * * Under the circumstances and conditions of the sale, defendant's breach of the contract on April 7, 1914, renders her liable to the plaintiff for the damages it suffered from such breach. * * * It was held in Badger State Lumber Co. v. Jones Lumber Co., 140 Wis. 73, 121 N.W. 933, that, where specific performance cannot be enforced, either party may stop performance and subject himself to the payment of compensatory damages. "In such cases it is held that an action cannot be maintained to recover the contract price, but may be maintained to recover damages for the breach of the contract"—citing cases in this court. The complaint is framed for recovery of the purchase price, and no evidence was offered to show damages resulting from the breach of contract.

Appellant makes no claim upon the record for recovery of damages. The most liberal rule of practice, * * * in the light of the record, would entitle plaintiff to no more than

nominal damages, and requires affirmance of the judgment.
* * *

The judgment appealed from is affirmed.

AUTOMATIC TIME-TABLE ADVERTISING CO. v. AUTOMATIC TIME-TABLE CO.

Supreme Judicial Court of Massachusetts, 1911. 208 Mass. 252, 94 N.E. 462.

[Action by the Automatic Time-Table Advertising Company against the Automatic Time-Table Company. There was a verdict for plaintiff, and defendant brings exceptions. This was an action of contract for damages for defendant's failure to comply with its terms. The contract recited that defendant sold plaintiff the following goods:] Twelve automatic time-table machines complete, together with all printed matter, timetables, electro-plates, printed goods and advertising matter, and advertising contracts, relating to said machines, which were sold, assigned and transferred to the said Automatic Time-Table Company by the said Automatic Time-Table Advertising Company under agreement, dated July 13, 1909. Said machines are described and located as follows: One machine located at Merrimack Square, in Lowell, Mass., one machine located in Lawrence, Mass., one machine located in Haverhill, Mass., one machine located in Salem, Mass., one machine located in Lynn, Mass., one machine located in Chelsea, Mass., six machines now standing in the shop of the Automatic Time-Table Company, 58 Middle street, Lowell, Massachusetts, and numbered on door on battery side of case respectively as follows: 8, 9, 10, 11, 12, and 13. * * *

LORING, J. The contract of July 16th was a contract for the sale of 12 specific machines and not a contract for the sale of 12 machines of a particular description. By its terms it purports to be a present sale, but it was a sale of "twelve automatic time-table machines complete," and there was evidence that no one of the "six machines now standing in the shop of the Automatic Time-Table Company" was complete.

The bill of exceptions is somewhat obscure on this point. But as we interpret it there was evidence that apart from the Gordon

batteries no one of these six machines was complete. We speak of the parts of the machine other than the Gordon batteries because it seems to have been the undisputed fact that as matter of practice these batteries were not put into the machines until they were set up for use on the premises of the purchaser or licensee, and setting up these machines on the premises of the plaintiff was not part of the obligation of the vendor under the contract here in question. It appeared that that was to be paid for by the vendee in addition to the purchase price named in the written contract.

The contract does not say that the "twelve automatic time-table machines" were complete, but it says that the defendant sells to the plaintiff "twelve automatic time-table machines complete." Evidence that the six here in question were in fact incomplete was admissible as one of the circumstances under which the contract was made and so one of the circumstances in the light of which it was to be construed.

Since something had to be done to the machines to put them in a deliverable state and a different intention did not appear, the property in the 6 machines here in question did not pass on the execution of the contract. The transaction was governed by the Sales Act (St.1908, c. 237) and it is there so provided in section 19, rule 2. The rule was the same at common law.
* * *

The defendant contends that the cases of *Glover v. Austin*, 6 Pick., Mass., 209, *Glover v. Hunnewell*, 6 Pick., Mass., 222, *Sumner v. Hamlet*, 12 Pick., Mass., 76, *Thorndike v. Bath*, 114 Mass. 116, 19 Am.Rep. 318, *Mauger v. Crosby*, 117 Mass. 330, and *Whittle v. Phelps*, 181 Mass. 317, 63 N.E. 907, are decisions to the contrary. Those are cases where it appeared that it was the intention of the parties to sell the chattel in its unfinished condition with an agreement by the seller to complete it; or in the language of St.1908, c. 237, § 19, those were cases where a different intention did appear.

The contract of July 16th, therefore, was not a contract of present sale of six unfinished machines with an agreement on the part of the defendant to complete them, but it was a contract to complete the six unfinished machines which on completion were to become the property of the plaintiff. * * * The

bill of exceptions went no further than to state that the "fire greatly damaged the 6 machines standing in the defendant's premises." * * *

The learned counsel for the defendant misconceives the character of the action now before us when he contends that the plaintiff has not put himself in a position to sue on the footing that the contract is rescinded. This is not an action founded on the decision of the contract of July 16th, but it is an action on that contract to recover damages for the defendant's failure to complete the 6 machines which at the date of the contract were standing in its shop, and on completion of them to pass the title to the plaintiff. * * *

(2) CONTRACTS ON SALE AND RETURN, AND CONTRACTS TO SELL ON APPROVAL—WHEN TITLE PASSES

1. When goods are delivered to the buyer "on sale or return" or on other terms indicating an intention to make a present sale but to give the buyer an option to return the goods instead of paying the price, the property passes to the buyer on delivery, but he may revest the property in the seller by returning or tendering the goods within the time fixed in the contract, or if no time fixed, within a reasonable time.
2. When goods are delivered to the buyer on approval or on trial and satisfaction, or other similar terms, the property therein passes to the buyer: (a) When he signifies his approval or acceptance to the seller or does any other act adopting the transaction. (b) If he does not signify his approval or acceptance to the seller, but retains the goods without giving notice of rejection, then, if a time has been fixed for a return of the goods, on the expiration of such time, and, if no time has been fixed, on the expiration of a reasonable time.³

In a contract where a present sale with an option to return the goods, *within* the time fixed or reasonable time if no time is set, instead of paying the price, is presumed to be intended, such bargain is a "sale or return" transaction. Title passes on delivery to the buyer and he may revest it by tender or return. Mere notice of rejection within the stipulated time is no return

³ Uniform Sales Act, § 19, rule 3.

or tender. The goods must be returned in the same condition in which they were when received. Any damage or loss falls on the vendee.

In a "sale on approval" transaction title does not pass to the vendee on delivery to him but after he indicates that his intent is to have title, or if he has not given notice of rejection, after the time fixed for the return of the goods or after a reasonable time if no time was set. Any loss during the trial period without fault of the vendee falls on the vendor in whom title still vests. Notice of rejection is sufficient to prevent the passing of title.

MONTGOMERY WARD & CO. v. STATE COMMISSION OF REVENUE AND TAXATION

Supreme Court of Kansas, 1943. 156 Kan. 408, 133 P.2d 1008.

SMITH, J. This was an appeal from an order of the state tax commission refusing to set aside an order of the commission making an assessment against Montgomery Ward and Company of a certain sales tax. Judgment of the district court was entered setting aside this order and holding that the company was not bound to collect and pay the tax. The state tax commission has appealed. * * *

Upon the sales about which there was no dispute as to their being state sales the sales tax had been collected and remitted to the state by the company. There were, however, certain sales that originated in these different stores upon which the company did not collect the sales tax and hence did not remit it to the state. These were certain sales that originated at what is known as a mail order desk, or in a few instances, an order office. There is no dispute about the manner in which these sales were made. The company maintains in each retail store a department called a mail order desk. This is a desk where an employee of the company at the retail store is maintained to assist customers in purchasing merchandise of the company which is listed in its printed catalogue but is not carried by the store.
* * *

When the tax commission examined the books of the company it found that for a certain period of time through the

medium of mail order desks and order offices the company had sold \$971,617 worth of merchandise and that the tax liability upon these sales, together with penalty and interest, amounted to \$21,861.38. * * *

G.S.1941 Supp. 79-3603 provides as follows: "From and after June 1, 1937, for the privilege of engaging in the business of selling tangible personal property at retail in this state or rendering or furnishing any of the things or services taxable under this act, there is hereby levied and there shall be collected and paid a tax as follows: (a) A tax at the rate of two percent upon the gross receipts received from the sale of tangible personal property at retail within this state. * * * "

It will be seen that the tax is on retail sales within the state. There is no question but that the transactions we have described are sales. We have to decide whether these sales were made in Kansas or in Missouri. If the sales were consummated in Kansas then the company should have collected the tax on them and paid it to the state. If, on the other hand, the sales were consummated in Missouri they were not sales made within the state of Kansas and the company was not bound to collect the tax.

Briefly put, the company points out that the orders were accepted by it in Missouri, the goods were set aside for the customer in Missouri and since the customer paid the transportation charges the carrier was the agent of the customer and when the goods were delivered to the carrier this constituted delivery to the customer—hence the sales were consummated in Missouri.

This was the view taken by the trial court. * * *

There are two rules with reference to this general type of sales. One is known as a contract of sale or return, that is, where the sale is made with an option to return. In those cases the title passes to the buyer and the sale is completed upon delivery to the carrier regardless of the fact that the customer has a right to return the merchandise. The other is a sale on trial or approval. These are cases where the contract is to purchase certain goods if they prove to be satisfactory when delivered. In these cases the title does not pass until the buyer has expressly or impliedly expressed his approval or acceptance.

See 55 C.J. 584. The company points to the use of the word "return" or "right of return" in the record and argues that the contract in this case was a contract of sale or return and that it did not affect the passing of title. We have concluded that the undisputed evidence in this record as to the contract was that the buyer must be satisfied and that whatever he bought must please him. We think this more clearly brings the case within the rule of sale on approval than the rule of sale or return and that the title did not pass until the buyer had expressly or impliedly expressed his approval or acceptance. Naturally the retention or use of the goods would be the implied approval. We have concluded, therefore, that the sales described in this record were Kansas sales within the meaning of the statute which has been heretofore quoted. * * *

The judgment of the district court is reversed with directions to enter judgment against the company, appellant in the court below, in accordance with the views expressed herein.

FOLEY v. FELRATH.

Supreme Court of Alabama, 1893. 98 Ala. 176, 13 So. 485, 39 Am.St.Rep. 39.

[From the evidence it appeared that the plaintiff, Foley, of New York, entered into an agreement with the defendant, a retail dealer in Mobile, Alabama, to sell to the latter a shipment of goods. By the contract of sale it was agreed that the defendant buyer was to have the right to return such of the goods to be shipped to him as he would select, either for credit or exchange. The goods were shipped to the buyer by express, but were lost in transit to Alabama. This was an action for the purchase price, based on the theory that title had passed to the defendant.]

HARALSON, J. * * * "Where * * * goods are sold and delivered, the terms of sale being specified, and the vendee reserves the right to reject or return, the title passes, liable to be divested by the exercise of this option to rescind expressed within a reasonable time." * * * An option to purchase if the party to whom the goods are transferred should like is very different from an option to return the goods if he should not

like them. * * * [In the latter case, which is the situation here before us, title passes to the buyer, and the risk of loss will be upon him. Judgment for plaintiff.]

NEAL, CLARK & NEAL CO. v. TARBY.

Supreme Court of New York, Special Term, Erie County, 1917.
99 Misc. 380, 163 N.Y.S. 675.

[Action by the Neal, Clark & Neal Company against Michael J. Tarby. From a judgment dismissing the complaint, plaintiff appeals.]

WHEELER, J. The facts in this case are undisputed, and briefly stated are: That the plaintiff, among other things, deals in Victrolas. One Fertig was the solicitor of advertising, and in that capacity was accustomed to visit the plaintiff's store. On the occasion of one of his visits the subject of the purchase of a Victrola was brought up by one of plaintiff's salesmen. Fertig was asked if he had decided to purchase a Victrola to which he replied: "No, we haven't reached a point where we will decide on it." The salesman suggested sending one out on approval to which Fertig replied: "If you want to take a chance, and send it out on approval, with the understanding I don't have to purchase it unless I want it, all right." To this the salesman replied: "All right, I will send it out with a selection of records, and see if we can't later sell you the machine."

They then selected a Victrola of the price of \$150, which seems to have been fully understood, and the machine was delivered to Fertig. The salesman testified that some time later he asked Fertig if he had decided to purchase, to which Fertig replied: "We haven't quite decided to purchase the machine." To which the salesman replied: "All right; let us know when you are ready." It further appears that Fertig moved the machine to the Lenox Hotel, where he went to live, and while there sold and delivered the Victrola to the defendant in this action, who paid Fertig \$75 therefor. Fertig then left, and has not since been seen.

The plaintiff, learning the facts, and claiming to own the machine, demanded it of the defendant, who refused to de-

liver it up. The plaintiff then brought this action in the City Court to recover possession. The City Court dismissed its complaint, and the case now comes before this court on appeal.

The plaintiff, in substance, contends there never was any consummated sale; that the title of the property never passed to Fertig, and he could give none to the defendant; that Fertig stole or converted the Victrola to his own use, and the plaintiff should have recovered. The defendant contends he is protected as a bona fide purchaser for value under the provisions of the Personal Property Law, and that the court below did not err in dismissing the plaintiff's complaint.

The defendant stands on the provisions of section 129 of that act, as added by Laws 1911, c. 571, providing: "The buyer is deemed to have accepted the goods when he intimates to the seller that he has accepted them, or when the goods have been delivered to him and he does any act in relation to them which is inconsistent with the ownership of the seller, or when, after the lapse of a reasonable time, he retains the goods without intimating to the seller that he has rejected them." It seems to us that this section governs the case here presented for review.

If we correctly interpret the transaction between the plaintiff and Fertig, it amounted to this: The plaintiff delivered to Fertig the Victrola in question for trial, with the option to purchase it at the price of \$150. This offer was at no time canceled or recalled by the plaintiff. There was evidently, under this arrangement, no actual sale, and no transfer of title to Fertig, until he had accepted the offer, or until he did some act in relation thereto "inconsistent with the ownership of the seller." The instant Fertig undertook to sell the machine as his own, he did an act inconsistent with the ownership of the plaintiff. It was evident that he had, in fact, acted upon the plaintiff's option to sell, and, in the absence of fraud, it became a consummated sale between the parties to it. Under such circumstances, I think there can be no question but what the plaintiff would have had a perfect right to have sued and recovered from Fertig the agreed purchase price of the machine.

Section 100 of the Personal Property Law also provides: "When goods are delivered to the buyer on approval or on trial or on satisfaction, or other similar terms, the property

therein passes to the buyer—(a) When he signifies his approval or acceptance to the seller or does any other act adopting the transaction." * * *

It is urged, and with force, that the act of Fertig in selling the Victrola to the defendant was not, after all, an act affirming or accepting the right to purchase at an agreed price, but really a conversion or larceny of the property delivered to him, and therefore ought not to defeat the right of the plaintiff to follow the property into whosesoever hands it may be found.

We think, however, the provisions of the Personal Property Law above quoted were designed, not only to define the rights of parties to such transactions as between themselves, but also to afford protection to third persons who may deal with the buyer on the strength of his apparent ownership of the property possessed, so that any one intrusting another with the possession of property under circumstances such as in this case does so largely at his own risk, while an innocent purchaser dealing with one in possession will be fully protected. * * *

I am of the opinion that the judgment appealed from should be affirmed. * * *

SECTION 3.—CONDITIONAL SALES

In a conditional sale contract, title to the property is expressly retained in the seller until payment of the purchase price, although possession is turned over to the buyer. As in a cash sale, payment of the price is the operative fact to pass title.

In a sale with reservation of lien, title to the property passes to the buyer, the seller retaining possession of the goods as security for the price. If he loses possession, he loses his lien.

In both cases, risk of loss is upon the buyer.

In these days of installment buying there is no form of commercial transaction more important than the conditional sale contract. The situation is this: The buyer wants to buy, and the seller is willing to sell, on credit. The problem is how best to secure the seller for the future payment of the purchase

price. This might be done, and often is, by the seller's making an absolute sale of the goods, delivering title and possession of the goods sold to the buyer, and taking back a chattel mortgage on the goods to secure payment. Business finds an objection to this method, however, in the trouble caused by the legal formalities of foreclosure necessary before the seller can get the title to the goods back in himself, where the buyer defaults in his payment.

By the conditional sale contract, on the other hand, although the buyer gets possession of the goods purchased he does not get title. The property in the article sold remains in the seller until the agreement as to payment has been carried out. Thus, on a default in payment the seller may repossess himself of the goods, the title remaining in him all the time. The essence of the conditional sale contract is that, by the expressed intention of the parties, title remains in the seller until payment of the purchase price. This is but an application of the rule that title will pass, or fail to pass, according to the intention of the parties.

The device of a present sale with reservation of a lien for the purchase price is not so useful as the conditional sale contract, for the buyer is deprived of the thing which may be for him of extreme importance, i. e., possession of the goods purchased.

It remains to consider the rights and duties of buyer and seller in a conditional sale contract.

RISK OF LOSS

Where delivery of the goods has been made to the buyer, or to a bailee for the buyer, in pursuance of the contract, and the title to the goods has been retained by the seller merely to secure performance by the buyer of his obligation under the contract, the goods are at the buyer's risk from the time of delivery.

The general rule is that risk of loss follows title; that is, whoever has the property in the goods at the moment of the loss suffers the damage. The conditional sale, however, presents an exception to this rule, for here the risk of loss is upon the buyer. The reason is that, although the seller retains title, it is for

the special purpose of security alone; the real ownership is in the buyer, and therefore he should suffer in case of any loss.

As stated, the purpose of the conditional sale is to constitute security to the seller for the payment of the price by retaining title in him. Thus, if the buyer, before payment, should sell the goods to an innocent purchaser, such purchaser would get no title. In this connection it should be noted that some states have statutes providing that all conditional sales contracts must be recorded to make them effective against purchasers from a conditional vendee, and that, where there is a failure so to record, an innocent purchaser from such conditional vendee, without actual notice of the conditional sale agreement, gets good title to the goods.

CHAPTER 3

TRANSFER OF TITLE IN SALES OF UNASCERTAINED GOODS

Section

1. Where Intention to Effect a Present Sale is Expressed.
 2. Presumption, Where Intention Not Expressed, as to Unascertained Goods.
 3. When Delivery to Buyer is Necessary to Pass Title.
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SECTION 1.—WHERE INTENTION TO EFFECT A PRESENT SALE IS EXPRESSED

1. GENERAL RULE

Sales Act, § 17:

Where there is a contract to sell unascertained goods, no property in the goods is transferred to the buyer unless and until the goods are ascertained, but property in an undivided share of ascertained goods may be transferred as provided in section 6.

Goods are unascertained:

- (1) When they are not in existence at the time of the contract; and
- (2) When they are in existence but are mixed with other goods and it is yet to be determined what particular goods will finally be delivered to the buyer.

It is evident that title to goods that are unknown and unidentifiable cannot be passed. To have a contract of present sale requires articles or goods that are ascertained, that is, particular goods the parties have specified. It is obvious that a contract to pass title to goods to be ascertained in the future is valid as a contract creating personal obligations on the parties; but that is beside the question as far as passing present title is concerned.

HAHN et al. v. FREDERICKS.

Supreme Court of Michigan, 1874. 30 Mich. 223, 18 Am.Rep. 119.

[Action by Fredericks to recover the sale price of 200 cords of wood destroyed by fire. Hahn had contracted to buy from Fredericks 200 cords of hard wood out of a pile of between 350 and 400 cords stacked together on the edge of Portage Lake. The parties agreed that title to the 200 cords purchased was to pass immediately to the buyer, and that Hahn, the buyer, was to select his wood from the pile and haul it away. It appeared from the evidence that there was some soft wood mixed in with the pile. A fire destroyed all of the wood before there was any withdrawal.]

It was contended by the plaintiff that title to the 200 cords of hard wood in question even though unascertained, had passed to the buyer by virtue of the agreement, and that, since risk of loss follows title, Hahn was liable for the purchase price.]

CAMPBELL, J. * * * The principal question in the case seems to be whether the sale actually attached to any two hundred cords which could be identified before the fire. * * *. Until an actual measurement, which was to be made when the hard wood was removed from the piles and as it was placed on the scows, it is evident that there could be no parcel identified to which a sale could attach as complete. It was a bargain for a parcel yet to be measured out of a larger parcel of various qualities, and of an extent not determined. * * *

We have found no authority which recognizes such a transaction as a completed sale. It was not a sale in gross of an entire parcel of wood, where the measurement was only necessary to ascertain the quantity, as in Adams Mining Co. v. Senter, 26 Mich. 73. Here the measurement was necessary to complete the identification, and to determine what wood was to belong to the purchaser. Under such an arrangement, it is well settled that no title passes to any portion of the property until it has been measured and thus identified and severed from the rest. * * *

The judgment below must be reversed. * * *

2. THE EXCEPTION IN THE CASE OF FUNGIBLE GOODS

Sales Act, § 6:

In the case of fungible goods, there may be a sale of an undivided share of a specific mass, though the seller purports to sell and the buyer to buy a definite number, weight or measure of the goods in the mass, and though the number, weight or measure of the goods in the mass is undetermined. By such a sale the buyer becomes owner in common of such a share of the mass as the number, weight or measure bought bears to the number, weight or measure of the mass.

For this exception to the preceding section to operate, the parties to the contract must intend a present sale of an undivided share of a specific mass of fungible goods of which the vendor is the owner. If the goods are not fungible or the vendor the owner of them no title can pass no matter how clearly the intent to pass title is indicated. The mass becomes specific if it is indicated and the quantity to be taken from it. Goods are fungible if each unit is equal to every other unit in size, shape, texture or quality.

KIMBERLY et al. v. PATCHIN.

Court of Appeals of New York, 1859. 19 N.Y. 330, 75 Am.Dec. 334.

[Action for damages for defendant Patchin's interference with and conversion of certain wheat to which the plaintiff, Kimberly, claimed title. Defendant maintained that his possession of the wheat was not wrongful, for the reason that the title thereto was in him and not in the plaintiff.

The evidence showed the facts as follows: One Dickinson owned two piles of wheat which were stored in a warehouse, amounting in all to 6,249 bushels. Dickinson sold 6,000 bushels to Patchin, defendant herein, without then separating the amount sold from the mass, and signed a memorandum of sale to that effect. Then before delivery of the 6,000 bushels to Patchin, Dickinson sold all of the wheat in the warehouse to the plaintiff, Kimberly. Patchin got possession of the wheat.

The sole question in this case was whether it was possible for title to an unascertained 6,000 bushels to pass to Patchin by the contract of sale.]

COMSTOCK, J. * * * The quantity of wheat in store to which the contract related was estimated by the parties at about 6,000 bushels. But subsequently, after Dickinson made another sale of the same wheat to the * * * plaintiffs, * * * it appeared on measurement that the number of bushels was 6,249, being an excess of 249 bushels. * * * When [defendant] bought the 6,000 bushels, that quantity was mixed in the store-house with the excess, and no measurement or separation was made. The sale was not in bulk, but precisely of the 6,000 bushels. On this ground it is claimed on the part of the plaintiffs, that in legal effect the contract was executory, in other words a mere agreement to sell and deliver the specified quantity, so that no title passed by the transaction. It is not denied, however, * * * that the parties intended a transfer of the title. The argument is, and it is the only one which is even plausible, that the law overrules that intention. * * *

It is a rule asserted in many legal authorities, but which may be quite as fitly called a rule of reason and logic as of law, that in order to be an executed sale, so as to transfer a title from one party to another, the thing sold must be ascertained. This is a self-evident truth, when applied to those subjects of property which are distinguished by their physical attributes from all other things, and, therefore, are capable of exact identification. No person can be said to own a horse or picture, unless he is able to identify the chattel or specify what horse or what picture it is that belongs to him. It is not only legally, but logically, impossible to hold property in such things unless they are ascertained and distinguished from all other things; and this, I apprehend, is the foundation of the rule that, on a sale of chattels, in order to pass the title the articles must, if not delivered, be designated so that possession can be taken by the purchaser without any further act on the part of the seller.

But [there are some things in which title] can be acquired and held * * * which are capable of such an identification. * * * Of this nature are wine, oil, wheat, and other cereal grains, and the flour manufactured from them. * * * In respect to such things, * * * where the quantity and the general mass from which it is to be taken are specified, the subject of the contract is [sufficiently ascertained so the title may pass immediately]. * * *

We are of the opinion, therefore, both upon authority and clearly upon the principle and reason of the thing, that the defendant * * * acquired a perfect title to the 6,000 bushels of wheat. Of that quantity he took possession at Buffalo, by a writ of replevin against the master of the vessel in which the whole had been transported to that place. For that taking the suit was brought and it results that the plaintiff cannot recover. * * *

Judgment reversed and new trial ordered.

SECTION 2.—PRESUMPTION, WHERE INTENTION NOT EXPRESSED, AS TO UNASCERTAINED GOODS

Rule 4. An act of unconditional appropriation to the contract is necessary to pass title.

Where there is a contract to sell unascertained or future goods by description, and goods of that description and in a deliverable state are unconditionally appropriated to the contract, either by the seller with the assent of the buyer or by the buyer with the assent of the seller, the property in the goods thereby passes to the buyer. Such assent may be expressed or implied, and may be given either before or after the appropriation is made.¹

Where, in pursuance of a contract to sell, the seller delivers the goods to the buyer, or to a carrier or other bailee (whether named by the buyer or not) for the purpose of transmission to or holding for the buyer, he is presumed to have unconditionally appropriated the goods to the contract, except in the cases provided for in the next rule. This presumption is applicable, although by the terms of the contract the buyer is to pay the price before receiving delivery of the goods, and the goods are marked with the words "collect on delivery" or their equivalent.²

The above rules make it plain that in the case of unascertained goods title does not pass as soon as the goods are ascertained,

¹ Uniform Sales Act, § 19, rule 4 ² Id., rule 4(2).
(1).

unless the intention of the parties be very clearly expressed to that effect. The legal presumption, as stated in rule 4, operative in the absence of an expressed intention, requires a further act to pass title, namely, an *unconditional appropriation to the contract*. Thus the question to be considered is: What acts on the part of the seller will amount to an unconditional appropriation? The cases following make clear the answer to this question:

KNOXVILLE TINWARE & MFG. CO. v. ROGERS.

Supreme Court of Tennessee, 1928. 158 Tenn. 126, 11 S.W.2d 874.

SWIGGART, J. Complainant, Knoxville Tinware & Manufacturing Company, has appealed from a decree of the chancery court sustaining a demurrer to its original bill.

The suit was filed for the writ of replevin, to recover possession of a hot air furnace and certain piping and other material located in the basement of a building purchased by the defendant, Rogers, at a foreclosure sale, held pursuant to a deed of trust executed by one Charles R. McClung. The bill avers that at the time Rogers purchased the building the furnace was not attached to the building, but that Rogers claimed that the furnace passed to him as an appurtenance to the house and lot.

The bill avers that complainant had delivered the furnace to the premises under a contract with McClung for the furnishing and installation of such a furnace, together with the casing and piping incidental thereto; that when it had delivered the furnace and material to the premises "in pursuance of the carrying out of its said contract," but before the work of installing the furnace was begun, McClung died, insolvent, and no further steps were taken to complete the contract, the furnace and the materials for completing the contract being left on the premises, unattached, at the time of the subsequent purchase of the premises by Rogers.

The bill avers that the furnace was never attached to or made a part of the realty, and was not appurtenant to the realty; that title thereto did not pass from complainant and was not to pass until the furnace was completely installed and made a part of the realty; and that defendant has no title to or interest in or right

of possession to the furnace, so that his retention of possession is wholly unlawful and without authority.

The description of the contract between complainant and McClung, contained in the bill, is that it was a contract "for the furnishing and installation of one Cole's Hot Blast Boiler Plate Furnace, No. 2484, with casing and warm air pipe, and other material incident to the installation of said furnace." The bill avers that McClung "agreed to pay for said furnace when the same was completely installed the sum of \$240.00, and that no part of said indebtedness has been paid." * * * *

If the contract between complainant and McClung be treated as one for the sale of goods, it is the contention of the defendant that the delivery of the goods on the premises of McClung had the effect of passing title to McClung under rules 4 and 5, prescribed in section 19 of the Uniform Sales Act (Acts 1919, c. 118). These rules are introduced by the caption:

"Unless a different intention appears, the following are rules for ascertaining the intention of the parties as to the time at which the property in the goods is to pass to the buyer."

"Rule 5" provides only that if the contract to sell requires the seller to perform certain designated acts incident to transportation and delivery, the property does not pass until such acts have been performed; and it does not necessarily follow that the performance of these designated acts of delivery or transportation effects a transfer of the property or title.

Rule 4 is as follows:

"Where there is a contract to sell unascertained or future goods by description, and goods of that description and in a deliverable state are unconditionally appropriated to the contract, either by the seller with the assent of the buyer, or by the buyer with the assent of the seller, the property in the goods thereupon passes to the buyer.

"Such assent may be expressed or implied, and may be given, either before or after the appropriation is made."

Subsection 2 of rule 4 states conditions under which the seller will be presumed to have "unconditionally appropriated" the goods to the contract of sale; and it may be conceded that the delivery of the furnace and materials by complainant to the

premises of McClung would have amounted to their unconditional appropriation to the contract, if the other conditions to the application of the rule were present.

It will be noted, however, that as a condition precedent to the transfer of title, rule 4 states that the goods must be unconditionally appropriated to the contract "in a deliverable state."

The phrase "in a deliverable state" is defined in section 76 of the Sales Act as follows:

"Goods are in a 'deliverable state' within the meaning of this act when they are in such a state that the buyer would, under the contract, be bound to take delivery of them."

It is impossible to assume that McClung would have been bound to take delivery of the furnace and materials, under a contract calling for their installation in his building, when they were simply deposited in the basement of the building, with no part of the work of installation performed.

If a contract for the sale of unascertained or future goods by description requires the installation of such goods in a building, as in the case of a furnace required to be installed by the seller, we are of the opinion and hold that the goods are not in a deliverable state, so long as the installation is incomplete; and in such case the property in the goods does not pass to the buyer until the goods are installed, under rule 4. * * *

[Demurrer overruled.]

MITCHELL et al. v. LE CLAIR.

Supreme Judicial Court of Massachusetts, 1896. 165 Mass. 308, 43 N.E. 117.

Contract upon an account annexed, to recover the price of sixty tubs of butter sold by the plaintiffs to the defendant. Trial in the superior court, without a jury, before Richardson, J., who allowed a bill of exceptions, in substance as follows:

The plaintiffs are wholesale butter dealers in Boston, and the defendant is a grocer in Southbridge. On September 6, 1893, the defendant visited the store of the plaintiffs inquiring the price of butter. The plaintiffs offered to sell to the defendant sixty tubs of butter, of the same kind and quality as that previously bought

by the defendant from the plaintiffs, for twenty-seven cents per pound, cash, provided he accepted before twelve o'clock on the following day. The defendant before twelve o'clock on the following day, by telegram, accepted the offer. The plaintiffs testified that, immediately upon the acceptance of the offer, they went to the public storage warehouse, where they had large quantities of butter stored, and picked out sixty tubs of butter, weighed it, set to one side, and marked each tub for the purpose of designating it as the butter of the defendant, and at once sent a bill of all of it to the defendant, marked "Cash on demand." The defendant had no notice whatever of this selection, setting aside, and marking of sixty tubs of butter, except the receipt of the bill. There was no evidence introduced to show that the kind or quality of the butter thus set aside was or was not of a similar grade or quality as that sold the defendant before. No objection was ever made by the defendant to paying for any of it on the ground that it was not of the quality or kind of butter purchased. Afterward, the defendant at different times directed shipments to be made by the plaintiffs, of the butter so bought by him, and the same was shipped to the amount of forty tubs, and accepted without any objection, and paid for. The plaintiffs testified that these forty tubs were taken from the lot set aside as stated above; but of this fact the defendant had no knowledge, except from the bill sent at the time of purchase, which enumerated the separate weight and tare of each tub of butter.

In March, 1894, the defendant directed the plaintiffs to ship to him the remaining twenty tubs of butter. This the plaintiffs refused to do until they had first received the pay for them, claiming that the sale was for cash on demand, and demands for payment having been previously made. The defendant did not understand these to be the terms; but did understand that he was to receive delivery of the butter, and pay for it during the three months succeeding September 26, 1893. The price of butter declined in the market soon after the agreement was made. The plaintiffs still have the butter on storage, subject to the order of the defendant when he pays for it. The defendant asked the judge to rule "that the selection, setting aside, and marking the sixty tubs, as testified to by the plaintiffs, could not be considered a delivery, the defendant neither having knowledge of such action nor assenting thereto, expressly or by implication; and

"that the plaintiffs had failed to make out their case, in that there was no evidence that the butter selected, set aside, and marked, as aforesaid, was of the kind and quality ordered."

The judge refused to rule as requested; found that, by the agreement, the defendant was to take all the sixty tubs, and pay for it within three months from September 26, 1893; and that the plaintiffs made several demands upon the defendant, before and after the expiration of the three months, to take the rest of the butter and pay for it, and found for the plaintiffs. The defendant alleged exceptions.

KNOWLTON, J. The principal question in this case is whether there was a sufficient delivery of the butter to pass the title as between the parties. There is no dispute that there was a good contract of sale, and no question arises under the statute of frauds.

The defendant accepted by telegram the plaintiffs' offer to sell him sixty tubs of butter of a specified quality at twenty-seven cents per pound. The plaintiffs had in their storehouse a large quantity of butter. Upon receipt of the defendant's telegram accepting their offer, they were impliedly authorized, as the defendant's agents, to set apart and appropriate to him the goods called for by the contract. This they immediately did, weighing the butter, setting it apart, and marking each tub for the purpose of designating it as the defendant's property. They then at once sent him a bill of all of it, marked "Cash on demand." This completed the sale and passed the title. * * *

[Judgment for plaintiffs.]

DENTZEL v. ISLAND PARK ASS'N et al.

Supreme Court of Pennsylvania, 1911.
229 Pa. 403, 78 A. 935, 33 L.R.A.,N.S., 54.

[This was an action by the seller of a machine to recover possession thereof from the buyer for nonpayment of the purchase price. The seller's right to maintain this action and get back possession of the machine depends upon whether title remained in him or whether title has passed to the buyer. It appeared from the evidence that by the contract the buyer agreed to

pay \$5,000 for the machine as follows: \$250 on signing the agreement, \$2,500 upon erection of the machine, and the balance in notes maturing at some later time. The buyer further agreed to pay the freight. The seller was to furnish a man to erect the machine at its place of destination and to put it in order for operation. The said machine was shipped as stipulated, "f. o. b. cars, Philadelphia."]

STEWART, J. * * * It is a general rule, not to be questioned, that when the contract in a sale of personal property calls for delivery f. o. b. at some particular place, and the seller there delivers the article in accordance with the stipulations, the title to the property at once passes to the buyer, unless otherwise provided. * * * The rule yields where the contract reserves to the seller the right of property notwithstanding the delivery to the carrier. Since delivery is after all a matter of intention on the part of the seller, even though the contract calls for delivery f. o. b. cars at a designated place of shipment, the seller may, before the delivery on board the cars, stipulate with the carrier that the latter is to carry it for him, thereby making the carrier the seller's agent in receiving the property. This follows when the seller takes from the carrier a bill of lading which secures the shipper against delivery, at the point of destination, to anyone except upon his order. When the contract, however, as here, shows an agreement to deliver f. o. b. with nothing to qualify it, the law will presume a delivery to have been in accordance with the stipulations, and cast the burden on the seller if he assert the contrary. There is not a particle of evidence in the case that this burden was discharged. * * *

We now reverse the judgment on the verdict, and enter judgment for the defendant.

CITY OF CARTHAGE v. DUVALL.

Supreme Court of Illinois, 1903. 202 Ill. 234, 66 N.E. 1099.

[This was an action by the city of Carthage against the defendant, agent of the American Express Company, for violation of a city ordinance which declared illegal all sales of intoxicating liquor within the jurisdiction of the city. The case was presented on an agreed statement of facts from which it appeared that one

Skidmore, a resident of Carthage, had ordered a gallon of whisky from a distillery in Burlington, Iowa, to be shipped to him at Carthage C. O. D. The liquor was shipped by express and delivered to Skidmore by the express agent at Carthage, the defendant herein. It is alleged that title passed upon delivery by the carrier to the buyer, and collection by the carrier of the purchase price, and therefore it was a sale by the defendant in violation of the city ordinance.]

HAND, J. The general rule frequently announced by this court is, that the delivery of personal property by the seller to a common carrier to be conveyed to the purchaser is a delivery to the purchaser, and that the title to the property vests in the purchaser immediately upon its delivery to the carrier. * * * Whether such rule applies where the property is consigned C. O. D. is an open question in this court, but upon principle and authority, where, as here, everything which the seller has to do with the property has been done at the time it is delivered to the carrier, we see no reason why the title does not vest in the purchaser immediately upon its delivery, although it is consigned C. O. D. * * * The cases that hold the title to the property vests in the purchaser upon a C. O. D. consignment, place such holding upon the ground that the carrier is the agent of the purchaser to deliver the property and the agent of the seller to collect and return the purchase price, and that the only interest of the seller in the property after its delivery to the carrier is a lien for the purchase price.

From an examination of the authorities cited in the briefs, and such other authorities as we have been able to find bearing upon the subject, we have reached the conclusion that the sale to Skidmore was completed when the liquor was delivered to the express company in Burlington, and that no sale of liquor was made by the defendant to Skidmore in the city of Carthage.

[Judgment for defendant affirmed.]

S. & D., ENG. & ARCH. 3RD ED.—29

SECTION 3.—WHEN DELIVERY TO BUYER IS NECESSARY TO PASS TITLE

Rule 5. If a contract to sell requires the seller to deliver the goods to the buyer, or at a particular price, or to pay the cost of freight or transportation to the buyer, or to a particular place, the property does not pass until the goods have been delivered to the buyer or reached the place agreed upon.

Subject to contrary expressed intention, the presumptive intent, when the contract requires delivery of the goods to the buyer, is that title passes upon delivery. The question then arises: What constitutes delivery to the buyer? Delivery to the buyer's agent will be equivalent to delivery to the buyer. The question of who is to pay the freight or transportation then becomes of importance. If the seller is to pay the freight, delivery to the carrier for shipment to the buyer will not constitute delivery to the buyer. If the buyer is to pay the freight from a certain point, delivery by the seller to a carrier for shipment to the buyer will pass title, and risk of loss from then on is on the buyer. So, in a c. i. f. contract, since the buyer is to pay the freight, "delivery to the buyer" occurs when the seller delivers the goods to the carrier for shipment to the buyer; and risk of loss is on the buyer from then on. Under an f. o. b. contract, since the seller agrees to deliver the goods to some point f. o. b., delivery to the buyer does not occur until that point is reached.

SMITH CO., Limited, v. MARANO.

Supreme Court of Pennsylvania, 1920. 267 Pa. 107, 110 A. 94, 10 A.L.R. 697.

[Action by Smith Company, Limited, against Antonio Marano. Judgment for plaintiff, and defendant appeals.]

BROWN, C. J. The facts in this controversy are agreed upon in a case stated. Smith Company, Limited, is a corporation, with its place of business in the city of St. Johns, Newfoundland. The defendant is a resident of the city of Philadelphia, this state,

and is engaged in business there. In September, 1916, the plaintiff and defendant, by letters and telegrams, endeavored to complete a contract for the sale of codfish to the latter. As a result of preliminary negotiations, on September 26, 1916, plaintiff made the following offer to the defendant by telegram: "Will give you first quality at nine dollars, second quality at eight dollars per drum of one hundred pounds c. i. f. Philadelphia." On the following day the defendant wired his acceptance of 1,000 drums of the fish, first quality, and by letter of the same date directed the plaintiff to send with the first shipment of that quality 25 drums of the second quality. On or about October 4, 1916, the plaintiff shipped 300 drums of the fish of first quality and 25 of second quality, in accordance with the terms of the contract. The goods were shipped by a steamer from the city of St. Johns, consigned to the plaintiff's agent at New York, for transhipment to Philadelphia, to be delivered to the order of plaintiff, the bill of lading being indorsed by the plaintiff in blank. Under the terms of the contract, the plaintiff paid for the customary marine insurance on the goods shipped and the freight charges on them to Philadelphia. It immediately forwarded to the Girard National Bank of Philadelphia, through a bank in New York, the insurance policy, indorsed in blank, the invoice and a through bill of lading, also indorsed in blank, all attached to a sight draft on the defendant, in accordance with the contract between them, the draft being for \$2,900, covering the value of the fish shipped. About two days later the ship carrying the fish shipped by the plaintiff to the defendant was sunk by a submarine of the Imperial German government, on the high seas, while en route to the port of destination, and the goods in question were totally destroyed. The bill of lading and the sight draft were duly tendered to the defendant after the cargo had been destroyed. He refused to accept the draft, and subsequently refused to pay any part thereof. The parties agree that the expression "c. i. f." means that the price quoted by the plaintiff to the defendant, and accepted by him included the cost of the goods, the cost of obtaining customary insurance thereon, and the freight charges to the city of Philadelphia. On the foregoing state of facts the court below entered judgment in favor of the plaintiff for the full amount of its claim.

The letters "c. i. f." are abbreviations of the words "cost, insurance, and freight," and when used in connection with commercial quotations signify that the price to be paid for goods will include all charges to the port of destination. * * * The case now under consideration calls upon us for the first time to construe what may be termed a "c. i. f." contract for the purchase of goods, and to determine when, under such contract, there is delivery to the buyer. As just stated, plaintiff and defendant agree that the term "c. i. f." means that the price quoted to the latter and accepted by him included "the cost of said goods, the cost of obtaining the customary insurance thereon, and freight charges to the city of Philadelphia." In recognizing that such is the true meaning of the abbreviations, the English courts hold that property purchased under a contract in which they are used passes to the buyer upon the seller's delivery of it to a carrier. * * *

A concise statement of the rule is thus made by Mr. Justice Hughes in *Thames & Mersey Marine Insurance Co., Limited, v. U. S.*, 237 U.S. 19, 35 S.Ct. 496, 59 L.Ed. 821, Ann.Cas.1915D, 1087: "The requirements of exportation are reflected in the familiar 'c. i. f.' contract (that is, at a price to cover cost, insurance, and freight), which has 'its recognized legal incidents, one of which is that the shipper fulfills his obligation when he has put the cargo on board and forwarded to the purchaser a bill of lading and a policy of insurance with a credit note for the freight, as explained by Lord Blackburn in *Ireland v. Livingston*.' L.R. 5 H.L. 395-406. * * *"

Counsel for appellant admit that the judgment of the court below is in accord with the English decisions, followed in this country by the two cases cited, but their contention is that, under the Pennsylvania Sales Act of May 19, 1915, P.L. 543, 69 P.S. § 1 et seq., the property purchased by the defendant was never delivered to him, and the plaintiff is therefore not entitled to recover. The pertinent parts of that act are as follows: * * *

"Sec. 19. Unless a different intention appears, the following are the rules for ascertaining the intention of the parties as to the time at which the property in the goods is to pass to the buyer:
* * * Rule 5. If the contract to sell requires the seller to deliver the goods to the buyer, or at a particular place, or to pay the freight or cost of transportation to the buyer, or to a par-

ticular place, the property does not pass until the goods have been delivered to the buyer or reached the place agreed upon."

The appellant agreed to pay to the appellee a fixed price for the goods to be shipped to him. The price quoted to him, and which he agreed to pay, included not only the actual value of the fish to the seller, but insurance and freight charges to Philadelphia. If the price had not included insurance, it might be well urged that, under rule 5 of section 19 of our Sales Act, the goods were never delivered to the appellant; but, reading the contract as a whole—as it must be read—with the item for insurance included in it, "a different intention" on the part of the buyer is disclosed, * * * and that he must now be held to have understood that the delivery of the goods to the common carrier was a delivery to him, are clearly demonstrated by the court below in the following from its opinion directing judgment to be entered against him: * * * "No matter what is to be inferred from the reference to freight, the inference from that to insurance must also have weight. The contract must be interpreted as a whole. Both provisions must be explained, interpreted, and given their due force. A provision for the payment of freight by the seller or its inclusion in the price might indicate an intention to deliver at the end of the voyage, or it might be a consideration affecting the price merely, and the cost and uncertainty of the freight charge might be a burden accepted by the seller to expedite the sale. On the other hand, the provision with regard to insurance was either fully intended, and reasonable because of the risk the buyer intended to assume, or, if he did not so intend, it was entirely meaningless and mere surplusage."

* * *

The bill of lading, made out to the appellee or its order, was indorsed immediately by it in blank, and attached to the draft drawn upon the appellant. This merely meant that the appellee intended to retain property in the goods to secure performance by the defendant of his promise to pay for them, and did not, by the express words of the Sales Act, relieve him from the risk that was upon him from the time the goods were delivered to the carrier.

Judgment affirmed.

WESTMORELAND COAL CO. v. SYRACUSE LIGHTING CO.

Supreme Court of New York, Appellate Division, Fourth Department, 1913.
159 App.Div. 323, 145 N.Y.S. 420.

[Action by the Westmoreland Coal Company against the Syracuse Lighting Company. From a judgment for defendant, plaintiff appeals.] Plaintiff sought to recover in this action the purchase price of two canal-boat loads of coal shipped by it to the defendant. * * *

ROBSON, J. The parties to the contract * * * contemplated that plaintiff in fulfillment of the contract would ship the coal therein mentioned by rail from plaintiff's mines to Watkins, N. Y. It was to be there loaded on canal boats, and thence taken by boat to Syracuse, N. Y., and there delivered alongside defendant's dock as theretofore, plaintiff having furnished defendant with coal under prior contracts between the parties. The two boats with their loads of coal, which are the subject of this action, reached Syracuse and approached to within 300 or 400 feet of defendant's dock, which was on the north, or tow-path, side of the canal. They could not at once be docked and unloaded because two other boats then occupied the dock. These latter boats contained coal theretofore delivered by plaintiff under its contract; and their cargoes were then being unloaded by defendant. For this reason and also (as the evidence shows and the trial justice finds) "because the rules governing traffic upon the canal required it, the two boats in question were moved over to the south side of the canal nearly opposite defendant's dock to await their turn for being unloaded, until the unloading of the boats already at the dock was completed."

Notice of the arrival of the boats was given to defendant, the circumstances of which and of the casualty, which thereafter ensued causing the total loss of the coal, are succinctly stated in the findings, as follows: "That upon the arrival of the said two boats carrying the coal in question in this action at said point, 300 or 400 feet west of the defendant's dock, as above stated, the captain and man in charge of the boats notified the defendant of their arrival, and the defendant entered said boats as having arrived at the dock at 12 o'clock noon on July 30, 1907, in its books kept for that purpose. That at about 2 o'clock on the same

day, a break occurred in the banks of the Erie Canal a short distance west of the defendant's dock, and, without any fault on the part of the plaintiff, the boats with the cargoes of coal in question were drawn into the said break and lost." * * *

If the coal in question had not been in fact delivered to the defendant before it was lost, then the carrier still remained the agent of plaintiff for the purpose of making delivery of it under the contract. It is clear that the carrier's duty in making the delivery had not at that time ended. He still had to place the boats alongside defendant's dock. This he had not in fact done, though the boats at one time had approached within a few hundred feet of the dock. It is true that had the dock, at the time, not been completely occupied with other boats, which were then unloading, he would have done so. But defendant was not responsible for this delay in laying the boats alongside the dock. The boats already at the dock were discharging their cargoes of coal, which plaintiff, by its carrier in control of those boats, had previously delivered to defendant under the contract. Plaintiff was fully advised before the contract was made that the capacity of the dock was limited, so that only two boats could be there unloaded at the same time. There is no question that defendant was diligent in unloading the boats then at its dock. The arrival of the two boats, concerning which this controversy has arisen, before the dock was cleared for their reception, was due only to the carrier's management of their transportation. The carrier for this purpose was plaintiff's not defendant's agent. Taking them to the side of the canal opposite defendant's dock and tying them up where they were afterwards lost was the carrier's act. Defendant gave no direction as to their management, or what should be done with them. The entry on defendant's books of arrival of the boats did not in fact indicate actual delivery to nor receipt by the defendant; but was, as the evidence shows, simply a concession to plaintiff's interest for the sole purpose of fixing a time from which subsequent possible claims of boat captains against plaintiff for demurrage could be corrected and verified.

It is suggested that when plaintiff placed the coal on these boats there was an appropriation of it in fulfillment pro tanto of the executory contract for delivery of coal. While this may have been an actual appropriation by plaintiff to that end, yet it did not complete what it had agreed to do before title passed to the

defendant. Delivery of the coal was as much a part of its duty as actual selection and appropriation of it. Delivery of the coal at the place specified in the contract was required to be made, and then only would the defendant's assent to such appropriation in part fulfillment of the contract be established. Delivery was not made. Therefore title had not passed to defendant. * * *

By subdivision 5 of section 100 of the Personal Property Law (Consol. Laws, c. 41, * * * added by chapter 571, Laws, 1911) the effect of a provision in a contract of sale requiring the seller to deliver to the buyer the goods sold is declared to be, presumptively at least, that the property therein does not pass to the latter until the goods have been delivered to him, or reached the place agreed upon.

The judgment should be affirmed, with costs.

CHAPTER 4

RIGHTS AND REMEDIES OF THE BUYER

Section

1. Introduction.
 2. Right to Examine the Goods.
 3. Acceptance of the Goods.
 4. Return of the Goods.
 5. Buyer's Remedies for Breach of Warranty.
 6. Damages for Failure to Supply Goods.
-

SECTION 1.—INTRODUCTION

After the contract to sell has been entered into, the buyer has the following rights: To examine the goods, unless it is otherwise agreed; to reject the goods, if they do not comply with the terms of the contract; to recover damages for breach of warranties, express or implied; to recover damages for the failure of the seller to give him both title and possession; to recover damages for the seller's conversion of the goods, where, title having passed to the buyer, the seller withholds the goods on the buyer's demand for them; and, in some cases, to obtain a decree in equity for specific performance of the contract to sell.

SECTION 2.—RIGHT TO EXAMINE THE GOODS

The right of the buyer to examine the goods is governed by the following section of the Sales Act:

(1) Where goods are delivered to the buyer, which he has not previously examined, he is not deemed to have accepted them unless and until he has had a reasonable opportunity of examining

them for the purpose of ascertaining whether they are in conformity with the contract.

(2) Unless otherwise agreed, when the seller tenders delivery of goods to the buyer, he is bound, on request, to afford the buyer a reasonable opportunity of examining the goods for the purpose of ascertaining whether they are in conformity with the contract.

(3) Where goods are delivered to a carrier by the seller, in accordance with an order from or agreement with the buyer, upon the terms that the goods shall not be delivered by the carrier to the buyer until he has paid the price, whether such terms are indicated by marking the goods with the words "collect on delivery," or otherwise, the buyer is not entitled to examine the goods before payment of the price, in the absence of agreement permitting such examination.¹

The above three subsections are well correlated in the general plan of giving the buyer the right of inspection. The first makes reasonable opportunity of examining the goods a condition precedent to the seller's right to treat the buyer as having accepted the goods; the second directly grants the buyer a reasonable opportunity of examining the goods, unless it is otherwise agreed, in order that the buyer may ascertain whether the goods conform with the contract; and the third provides where the goods are delivered to the carrier, to be delivered to the buyer only when he has paid the price, and this is in accordance with an order from or agreement with the buyer, that there is no right of examining the goods, unless there is an agreement for such examination.

SECTION 3.—ACCEPTANCE OF THE GOODS AND ITS CONSEQUENCES

When we raise the question whether a buyer has accepted goods, we are not asking whether he has merely received them. It may be that the goods have arrived at the buyer's house or

¹ Uniform Sales Act, § 47.

place of business and that they have been placed on the buyer's premises with the buyer's assent; but, at the same time, it is possible that the buyer has not done any act that indicates that he wishes to accept the goods as being in compliance with the terms of the contract to sell, and, if he has not yet done any such act and has not allowed more than a reasonable time after delivery to elapse without indicating whether he accepts the goods as in compliance with the contract, he has not accepted.

The Sales Act provides:

The buyer is deemed to have accepted the goods when he intimates to the seller that he has accepted them, or when the goods have been delivered to him, and he does any act in relation to them which is inconsistent with the ownership of the seller, or when, after the lapse of a reasonable time, he retains the goods without intimating to the seller that he has rejected them.²

From the above statement, it is obvious that acceptance may come even before delivery, for the buyer may intimate to the seller that he accepted the goods as being in compliance with the contract, even before the seller has delivered them to the buyer. If the buyer assents to becoming owner of the goods, whether before or after delivery, he may be treated as having accepted.

Acceptance does not normally occur without any examination, or, at least, opportunity for examination. Generally speaking, it would be unreasonable and unjust to treat a buyer as having accepted, where he had neither done any positive act of acceptance nor had a reasonable opportunity to examine the goods tendered in performance of the contract. Hence the following subsection of the Sales Act:

Where goods are delivered to the buyer, which he has not previously examined, he is not deemed to have accepted them unless and until he has had a reasonable opportunity of examining the goods for the purpose of ascertaining whether they are in conformity with the contract.³

Prior to the Sales Act, there was disagreement on the question whether, under the common law, acceptance of specific

² Uniform Sales Act, § 48.

³ Uniform Sales Act, § 47(1).

goods by the buyer terminated implied warranties. Strangely enough, it was held in some states that such acceptance, in the case of a contract to sell, did end any implied warranty of quality, and that therefore the buyer could not thereafter bring any action for breach of warranty. The results of such a ruling would often be unreasonable and unjust. The Sales Act very properly adopts the other view, as follows:

In the absence of express or implied agreement of the parties, acceptance of the goods by the buyer shall not discharge the seller from liability in damages or other legal remedy for breach of any promise or warranty in the contract to sell or the sale. But if, after acceptance of the goods, the buyer fail to give notice to the seller of the breach of any promise or warranty within a reasonable time after the buyer knows, or ought to know of such breach, the seller shall not be liable therefor.⁴

ILLUSTRATIONS

1. A sold and delivered sugar to B. After four weeks of opportunity to inspect, B discovered defects in the sugar. Three weeks later, B notified A of the defects. Held that, in the sugar trade, an unreasonable time had elapsed, and that B therefore could not hold A liable on the warranty.⁵

2. C, a granite dealer, contracted to sell a monument of certain type to D, a dealer. C shipped the parts of the monument to D, who took them to the cemetery, where he planned to erect the monument. When the various parts had been placed in position, it was discovered that there were several spots on the cap and die which D regarded as defects. Without waiting to give C an opportunity to replace those sections of the monument, the appellants attempted to remove the supposed blemishes by cutting into the surface of the granite. Held that B had treated and used the purchased property in a manner that was wholly incompatible with the right of rejection; and that the buyer is deemed to have accepted the goods when they "have been delivered to him, and he does any act in relation to them which is inconsistent with the ownership of the seller." Cutting

⁴ Uniform Sales Act, § 49.

Rionda Co., 121 Misc. 474, 201 N.Y.S.

⁵ Joannes Bros. Co. v. Czarnikow-

409 (1925).

into the granite was an act inconsistent with the ownership of the seller.⁶

SECTION 4.—NONACCEPTANCE FOR NONCOMPLIANCE WITH CONTRACT DOES NOT CREATE DUTY IN BUYER TO RETURN THE GOODS

At the time of his nonacceptance of goods because of noncompliance with the contract, the buyer and the goods may be only a short distance from the seller and his place of business, or they may be thousands of miles away. In any event, if the goods do not comply with the contract, it would be very unjust to require that the buyer actually return them to the seller; and the law does not require such return. This is indicated by the following section of the Sales Act:

Unless otherwise agreed, where goods are delivered to the buyer, and he refuses to accept them, having the right so to do, he is not bound to return them to the seller, but it is sufficient if he notifies the seller that he refuses to accept them.⁷

SECTION 5.—BUYER'S REMEDIES FOR BREACH OF WARRANTY

For breach of warranty of the goods by the seller, the buyer has his choice of a number of remedies. It is only fair and reasonable that this should be so, for the buyer should be permitted to do what is best suited to saving him from loss, and the remedy that would be best adapted to this in one instance would not be in another.

⁶ Loeblein v. Clements, 130 Md. 627, 101 A. 693 (1917). ⁷ Uniform Sales Act, § 50.

Where there is a breach of warranty by the seller, the buyer may, at his election—

- (a) Accept or keep the goods and set up against the seller the breach of warranty by way of recoupment in diminution or extinction of the price;
- (b) Accept or keep the goods and maintain an action against the seller for damages for the breach of warranty;
- (c) Refuse to accept the goods, if the property therein has not passed, and maintain an action against the seller for damages for the breach of warranty;
- (d) Rescind the contract to sell or the sale and refuse to receive the goods, or, if the goods have already been received, return them or offer to return them to the seller and recover the price or any part thereof which has been paid.⁸

Under (a) above, the buyer would say, "I am keeping the goods and paying the price, minus the amount of damage caused to me by the breach of warranty." Then, if he failed to come to a settlement with the seller, he could simply wait to be sued by the seller for the price, and then, upon the bringing of action by the seller for the price, he could set up in recoupment or in extinction of the price the amount of the damage caused by the breach.

Under (b) above, the buyer could accept or keep the goods and pay the price and then bring action against the seller for breach of warranty. Unless the buyer has already paid for the goods before he learns of the breach of warranty, he will not ordinarily adopt this plan, for, when such a controversy arises, it is practically the universal tendency of business men as buyers to hold fast to the money they have and to pay nothing until sued by the seller, the breaker of the warranty.

Under (c) above, the buyer may say, "I will not accept the goods, because they do not comply with the warranties made by the seller, and I will sue the seller for breach of warranty."

Under (d) above, the buyer may say, "I will call off this contract, and will not accept any goods under it. In brief, I rescind." Also, if he has received the goods, he may say, "I have received the goods, but I do not accept them, as they do not

⁸ Uniform Sales Act, § 69(1).

comply with the warranty of the seller. I am returning them to you." If he does not wish to go to the trouble of returning the goods at once, the buyer may say, "I am holding the goods subject to your order, and will return them when you call for them."

The buyer, upon breach of warranty, may elect any of the above remedies that fits the case. Having elected and obtained his remedy, he cannot take advantage of any other remedy.

When the buyer has claimed and been granted a remedy in any one of these ways, no other remedy can thereafter be granted.⁹

ILLUSTRATIONS

1. A sold and delivered to B certain refrigerating machinery, warranted to cool a certain number of hogs of certain weight within a certain time and not to exceed a certain amount of fuel consumption. In an action brought by A against B for the purchase price, held that B may set up breach of warranty by way of recoupment.¹⁰

2. C sold D a lot of vacuum cleaners. In an action brought by C against D for the price, D set up in a counterclaim the breach of implied warranty of merchantability. In D's counterclaim was nothing indicating that notice of the breach of warranty had been given by D to C. Held, therefore, that D cannot prevail in setting up this breach. D should have given notice of the breach of warranty to C.¹¹

As it would not be fair for a buyer to be permitted to accept the goods as being in compliance with the contract, knowing of a breach of warranty, and then later to take advantage of the breach of warranty by rescinding the sale, the Sales Act makes the following provision:

Where the goods have been delivered to the buyer, he cannot rescind the sale if he knew of the breach of warranty when he accepted

⁹ Uniform Sales Act, § 69(2).

¹¹ *Regina Co. v. Gately Furniture Co.*, 171 App.Div. 817, 157 N.Y.S. 746

¹⁰ *Underwood v. Wolf*, 131 Ill. 425, 23 N.E. 598, 19 Am.St.Rep. 40 (1890).

(1916).

the goods, or if he fails to notify the seller within a reasonable time of the election to rescind, or if he fails to return or to offer to return the goods to the seller in substantially as good condition as they were at the time the property was transferred to the buyer. But, if deterioration or injury of the goods is due to the breach of warranty, such deterioration or injury shall not prevent the buyer from returning or offering to return the goods to the seller and rescinding the sale.¹²

Where the buyer is entitled to rescind the sale and elects to do so, the buyer shall cease to be liable for the price upon returning or offering to return the goods. If the price or any part thereof has already been paid, the seller shall be liable to repay so much thereof as has been paid concurrently with the return of the goods, or immediately after an offer to return the goods in exchange for repayment of the price.¹³

Where the buyer is entitled to rescind the sale and elects to do so, if the seller refuses to accept an offer of the buyer to return the goods, the buyer shall thereafter be deemed to hold the goods as bailee for the seller, but subject to a lien to secure the repayment of any portion of the price which has been paid, and with the remedies for the enforcement of such lien allowed to an unpaid seller by section 53.¹⁴

How much can the buyer recover as damages for breach of warranty? The answer to this question is sometimes simple and easy, and sometimes complex and difficult.

The Sales Act says:

The measure of damages for the breach of warranty is the loss directly and naturally resulting in the ordinary course of events, from the breach of warranty.

In the case of breach of warranty of quality, such loss, in the absence of special circumstances showing proximate damage of a greater amount, is the difference between the value of the goods at the time of delivery to the buyer and the value they would have had if they had answered to the warranty.¹⁵

In a great many instances, the measure of damages for breach of warranty is very easy to calculate, being merely the difference

¹² Uniform Sales Act, § 69(3).

¹³ Uniform Sales Act, § 69(4).

¹⁴ Uniform Sales Act, § 69(5). The remedies allowed an unpaid seller in

§ 53 have been alluded to in the first section of this chapter.

¹⁵ Uniform Sales Act, § 69(6) and (7).

between the value of the goods as they are and the greater value of the goods as they would have been if they had conformed with the terms of the warranty. In many other instances, other factors make the measure of damages more complex. For instance, the parties contract for the sale of goods warranted to be of certain quality, knowing very well that, if goods of a poorer quality than that specified in the warranty are supplied to the buyer, who is a merchant, his business will suffer and he may be subjected to actions for damages by customers. If such be the case, it may be proper to presume that the seller has assumed liability for such losses.¹⁶

SECTION 6.—RIGHT TO DAMAGES FOR FAILURE TO SUPPLY GOODS

(1) Where the property in the goods has not passed to the buyer, and the seller wrongfully neglects or refuses to deliver the goods, the buyer may maintain an action against the seller for damages for nondelivery.

(2) The measure of damages is the loss directly and naturally resulting in the ordinary course of events, from the seller's breach of contract.

(3) Where there is an available market for the goods in question, the measure of damages, in the absence of special circumstances showing proximate damages of a greater amount, is the difference between the contract price and the market or current price of the goods at the time or times when they ought to have been delivered, or, if no time was fixed, then at the time of the refusal to deliver.¹⁷

¹⁶ Hammond v. Busey, 20 Q.B.Div. 79 (1887).

¹⁷ Uniform Sales Act, § 67.

CHAPTER 5

WARRANTIES

Section

1. Express Warranties.
 2. Implied Warranties.
 3. The Warranties Extend only to the Immediate Purchaser.
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SECTION 1.—EXPRESS WARRANTIES

1. IN GENERAL

Any affirmation of fact, or any promise by the seller relating to the goods is an express warranty if the natural tendency of such affirmation or promise is to induce the buyer to purchase the goods, and if the buyer purchases the goods relying thereon. No affirmation of the value of the goods nor any statement purporting to be a statement of the buyer's opinion only shall be construed a warranty.

The incidents of a warranty are: (1) It may consist either of an affirmation or a promise. The affirmation relates to some existing attribute of the subject matter of the sale, whereas the promise relates to some future fact which the warrantor agrees to bring into existence. (2) The promise or affirmation must be of a fact and not of an opinion. (3) The promise or affirmation must be such as would naturally tend to induce the buyer to purchase the goods. (4) There must be shown a reliance on the part of the buyer upon the promise or affirmation. All four incidents must be proven in order to show a breach of warranty.

A warranty differs from a condition, in that it constitutes only a term of the seller's contract and does not amount to something upon which the other party's entire obligation depends. Warranty broken differs from fraud, in that in the latter case the false affirmation of fact is knowingly made,

whereas in the former the seller may be perfectly honest in his misstatement and still be liable for breach of warranty.

We discussed in the preceding chapter the subject of the buyer's remedy for breach of the seller's warranty. There remains the questions of requisites to a breach of warranty and content of the implied warranties.

2. THE AFFIRMATION OF FACT

The promise or affirmation must be of fact and not of opinion.

CHAMBERLAIN CO. v. ALLIS-CHALMERS MFG. CO.

District Court of Appeal, Second District, Division 3, California, 1942.
51 Cal.App.2d 520, 125 P.2d 113.

SHAW, Justice pro tem. The plaintiff bought from the defendant a sifting machine, the transaction being embodied in a written contract. The machine was delivered to and operated for a time by the plaintiff. Thereafter, the plaintiff brought this action to recover damages for breach of warranties of the machine. The answer denied the existence of the warranties sued on. * * *

At the trial it was stipulated that the balance of the price, as alleged in the counterclaim, was due by the terms of the contract and unpaid, leaving for consideration only the questions arising on plaintiff's claims of breach of warranty. In its amended complaint plaintiff alleged both what it claimed to be an express warranty of the efficiency of the sifter, set forth in the contract, and also an implied warranty, raised by the law, of its fitness for the purposes of plaintiff. We conclude that there was an express warranty, and therefore deem it unnecessary to discuss the points made regarding implied warranty.

The provision of the contract upon which plaintiff relies to state an express warranty reads thus: "Allis-Chalmers Manufacturing Company, hereinafter called the Company, proposes to furnish the Purchaser, on the following conditions, the machinery described below, or in the Company's specifications at-

tached, which are made a part of this proposal, f. o. b. cars point of shipment. One (1) Nordyke Square Sifter #4-22 lined with rubber and to be used to grade two tons per hour of Dry Pumice through the following screen meshes at 98½ per cent efficiency. * * * ” * * *

Plaintiff contends that the part of the contract above quoted is a warranty that the sifter will grade two tons per hour of dry pumice at 98½ per cent efficiency through the screen meshes listed, and we think this contention is well taken. Section 1732 of the Civil Code, which is a part (section 12) of the Uniform Sales Act, in force in this state since 1931, defines an "express warranty" as follows: "Any affirmation of fact or any promise by the seller relating to the goods is an express warranty if the natural tendency of such affirmation or promise is to induce the buyer to purchase the goods, and if the buyer purchases the goods relying thereon. No affirmation of the value of the goods, nor any statement purporting to be a statement of the seller's opinion only shall be construed as a warranty." The terms of this section do not require the use of the word "warrant" or any other such formal words to create a warranty, and the rule established long before the adoption of the Uniform Sales Law is that no such words are necessary. Cole v. Weber, 1924, 69 Cal. App. 394, 397, 231 P. 353.

Obviously, the language above quoted from the contract is not and does not purport to be a mere statement of the seller's opinion, so the last sentence of section 1732 does not preclude it from being regarded as a warranty. The stipulated fact that plaintiff insisted on having additional words inserted in this provision is enough to show, if more than its mere wording and plaintiff's signature to the contract were needed, that plaintiff relied thereon in making the purchase.

Defendant argues that the words of the contract beginning with "to be used" are not an affirmation of fact or a promise by the seller, but are "what the buyer informed the seller it intended to do with the goods purchased." Mere reading of the provision as a whole shows that the words referred to by defendant are not cast in the mold suggested. They are, as located in the contract, a part of defendant's proposal to plaintiff and must have been intended by it to convey some idea to plaintiff. Defendant also contends that the words inserted in the con-

tract at plaintiff's request are worth nothing, because of their context. But in construing a contract, the whole of it "is to be taken together, so as to give effect to every part, if reasonably practicable, each clause helping to interpret the other." Civ. Code, § 1641. We therefore look for some useful purpose to be served by the clause introduced by the words, "to be used." The words just preceding them are doubtless descriptive of the article sold, and the list of screen sizes serves in part the same purpose. But what purpose can be served by the words, "to be used to grade two tons per hour of Dry Pumice through the following screen meshes at 98½ per cent efficiency," except that of an assurance to the purchaser of the capacity and efficiency of the article described? We see none. Such a provision might reasonably be expected in a contract of sale of a machine, and while possibly more apt words could have been found, those used are not incapable of the meaning that the sifter will have a 98½ per cent efficiency when used as stated. We therefore ascribe that meaning to them. So construed they amount to a promise by the seller, their natural tendency would be to induce the purchase, and by the terms of section 1732 of the Civil Code they are an express warranty. * * *

HOBART v. YOUNG.

Supreme Court of Vermont, 1891. 63 Vt. 363, 21 A. 612, 12 L.R.A. 693.

The evidence of the plaintiff tended to show that in early June, 1888, he purchased a pair of horses, of which the horse in question was one; that he first saw these horses in May; that about the 1st of June he rode after them with the defendant; and that the defendant then warranted them to be sound. * * * The bill of sale which the plaintiff signed was as follows: "Alburgh, June 5, 1888. J. W. Hobart bo't of Sumner Young, Esq., one pair of black (Pilot) geldings, sound and kind, \$487.50 to be delivered on the cars at the depot with good halters, duties paid, and certificates of the same attached hereto. Rec'd. payment. S. Young." * * *

ROWELL, J. * * * An important question is whether the words "sound and kind," contained in the bill of sale, constitute an express warranty as matter of law. The law of warranty

has undergone much change since Chandelier v. Lopus, Cro.Jac. 4, decided in the Exchequer Chamber in 1803. It was there held that an affirmation that the thing sold was a bezoar stone was no warranty; for, it was said, every one, in selling his wares, will affirm that they are good, or that the horse he sells is sound; yet, if he does not warrant them to be so, it is no cause of action. But latterly courts have manifested a strong disposition to construe liberally in favor of the purchaser what the seller affirms about the kind and quality of his goods, and have been disposed to treat such affirmations as warranties when the language will bear that construction, and it is fairly inferable that the purchaser so understood it. * * * And now any affirmation as to the kind or quality of the thing sold, not uttered as matter of communication, opinion, nor belief, made by the seller pending the treaty of sale, for the purpose of assuring the purchaser of the truth of the affirmation and of inducing him to make the purchase if so received and relied upon by the purchaser, is deemed to be an express warranty. And in cases of oral contracts it is the province of the jury to decide, in view of all the circumstances attending the transaction, whether such a warranty exists or not. * * *

But when the contract is in writing it is for the court to construe it, and to decide whether it contains a warranty or not; * * * And by the great weight of recent authority positive statements in instruments evidencing contracts of sale, descriptive of the kind, or assertive of the quality and condition of the thing sold, are treated as a part of the contract and regarded as warranties if the language is reasonably susceptible of that construction, and it is fairly inferable that the purchaser understood and relied upon it as such.

Thus, in Hastings v. Lovering, 2 Pick., Mass., 214, 13 Am.Dec. 420, the sale note described the article as "prime quality winter sperm oil." The plaintiff declared in assumpsit on a warranty, and had judgment. In Henshaw v. Robins, 9 Metc., Mass., 83, 43 Am. Dec. 367, the bill of particulars affirmed the article to be indigo. The court said that that imported an express warranty if it was so intended, and that it must be taken to have been so intended, as there was no evidence to the contrary. In Brown v. Bigelow, 10 Allen, Mass., 242, a case exactly in point, these very words, "sound and kind," were held to constitute a

general warranty of soundness. In *Gould v. Stein*, 149 Mass. 570, 22 N.E. 47, 5 L.R.A. 213, 14 Am.St.Rep. 455, a bought and sold note described the article as "Ceara scrap rubber as per sample, of second quality." The court said that it did not admit of doubt that the note was intended to express the terms of the sale, and that the contract of the parties was to be found in what was thus written, read in the light of the attendant circumstances. Held a warranty that the rubber was of second quality, and that the fact that the plaintiff made such examination of it as he pleased did not necessarily do away with the warrant.

Osgood v. Lewis, 2 Har. & G., Md., 495, 18 Am.Dec. 317, is a leading case on this subject. There the bill of particulars contained a statement that the article was "winter-pressed sperm oil," and the question was whether those words were *per se* a warranty; and it was held that they were, for it was said they could not be regarded as mere matter of opinion or belief, but as the assertion of a material fact that the defendant assumed to know and to warrant the existence of. In *Kearly v. Duncan*, 1 Head, Tenn., 397, 73 Am.Dec. 179, the words, "said negroes, sound in body and mind," contained in a receipt for the price paid for them, were held clearly to constitute a warranty of soundness. The words, "being of sound mind and limb, and free from all disease," in a bill of sale of slaves, were held a warranty in *Cramer v. Bradshaw*, 10 Johns., N.Y., 484.

This case is criticized by Bennett, J., in *Foster v. Caldwell's Estate*, 18 Vt. 181, who would treat the words as a mere representation, descriptive of the property sold. But that case seems to have stood the test in New York, while *Seixas v. Woods*, 2 Caines, N.Y., 48, 2 Am.Dec. 215, and *Swett v. Colgate*, 20 Johns., N.Y., 203, 11 Am.Dec. 266, to which he refers, and which held that no warranty arises from a description of the kind of property sold, have been expressly overruled by *Hawkins v. Pemberton*, 51 N.Y. 198, 10 Am.Rep. 595, as not properly applying the doctrine that they correctly announce, wherein a contrary application is made, and wherein it is held that there is no distinction in principle between a representation as to quality and condition and a representation as to kind and character. And in 1 Smith, Lead.Cas., 7th Am.Ed., 341, it is said that such a distinction is too refined to be practicable.

In *Yates v. Pym*, 6 Taunt. 446, a description of bacon in a sale not as "prime singed" was held to be a warranty that it was prime singed. So in *Bridge v. Wain*, 1 Starkie, 504, the goods sold were described in the invoice as "scarlet cuttings." Held a warranty that they answered the known mercantile description of scarlet cuttings.

The advertisement of the sale of a ship described her as a "copper-fastened vessel," whereas she was only partially copper-fastened, and not what was called in the trade a "copper-fastened vessel." Held a warranty that she was copper-fastened. *Shepherd v. Kain*, 5 Barn. & Ald. 240. A sold note described turnip seed as "Skirving's Swedes." Coleridge, J., said that there was no doubt that the statement was made by the defendant a part of the contract, and it was held to be a warranty that the seed was Skirving's. *Allan v. Lake*, 18 Q.B. 560.

In *Wetherill v. Neilson*, 20 Pa. 448, 54 Am.Dec. 741, the bill of sale described the soda ash as being of a certain strength, whereas it was of a less strength, and unmerchantable. Held no warranty. It is said in 1 Smith, Lead.Cas., 7th Am.Ed., 343, that this case stands almost, if not quite, alone, and cannot be reconciled with the general course of decisions in this country and in England. In *Barrett v. Hall*, 1 Aik. 269, the note was payable in "good cooking-stoves." The court said that no definite quality could be intended from the term "good," and that it imported nothing but opinion, and was no warranty, and referred to *Chandelor v. Lopus*, Cro.Jac. 4, for authority, which is no longer authority. But we do not say that the court was wrong in that case, for "good" is a very common term of praise in trade, and, as used in the note, ascribed no particular quality to the stoves, and might well be regarded, in that case, as mere matter of opinion or commendation, and as so understood by the parties. In *Wason v. Rowe*, 16 Vt. 525, the bill of sale said the horse was "considered sound." Held no warranty; and with good reason, for "considered" was no assertion of a fact, but a mere expression of opinion.

The more recent cases in this state recognize the general rule that positive statements of fact by the seller in respect of the kind or the quality of the thing sold that constitute a part of the contract or form its basis, and that are fairly susceptible of such a construction, are to be regarded as warranties.

Thus in Beals v. Olmstead, 24 Vt. 114, 58 Am.Dec. 150, one of the reasons given why the defendant's statements ought to be regarded as warranties is that they were made positively, and concerning matters as to which he was supposed and professed to have knowledge. Therefore, it is said, he ought to expect to be bound by them. See, also, Drew v. Edmunds, 60 Vt. 401, 15 A. 100, 6 Am.St.Rep. 122; Enger v. Dawley, 62 Vt. 164, 19 A. 478.

It is sufficiently certain, as matter of construction, that the words, "sound and kind," found in the bill of sale before us, were intended by the parties to be a part of the contract of sale, and as such it would be unreasonable to construe them as an expression of mere opinion when they positively ascribe to the horses a condition and a quality that the defendant assumed to know they possessed, and that he had peculiar means of knowing, whether they possessed or not, while the plaintiff had no such means. We think the words, reading the instrument in the light of the attendant circumstances, clearly constitute an express warranty of soundness and that the chief judge was right in so holding.

Judgment affirmed.

BAIN v. WITHEY & OTTMAN.

Supreme Court of Alabama, 1895. 107 Ala. 223, 18 So. 217.

[This was an action for the purchase price of certain patent rights sold by plaintiffs to defendant. Bain defends on the ground of breach of warranty, that plaintiffs represented that they were the owners of a valuable patent right, and that they would sell and convey the same to him, authorizing him to make, sell, and lease the right to use said patent in certain counties, and further represented that said patent was a useful and beneficial invention; that said plaintiffs fraudulently concealed from the defendant that said patent was useless and worthless, while in fact said patent was of no value.]

COLEMAN, J. * * * Neither of the pleas set up a statement or representation as having been made by plaintiffs as to the stability or durability of the fence, or its adaptability as a barrier to hogs, or to the cost of construction, or any fact character-

istic of a fence made after the patent. The language of the plea in this respect is, that plaintiffs represented it "as a valuable and useful improvement," but unaccompanied by the statement of any fact which rendered it "valuable and useful." An expression of this character, made with reference to a patented improvement, standing by itself, not emphasizing a material fact, can be but the expression of an opinion, upon which a purchaser has no right to rely. * * * As stated by Benjamin on Sales, 316, "the vendor is at liberty to praise his merchandise, in order to enhance its value, if he abstain from a fraudulent representation of facts, provided the buyer have a full and fair opportunity of inspecting it, and no means are used for hiding the defects." A buyer may always protect himself by requiring a warranty of such matters as he is unwilling to take the risk on his own judgment. * * *

[Judgment for plaintiffs.]

SPENCER HEATER CO. v. ABBOTT.

Court of Errors and Appeals of New Jersey, 1918. 91 N.J.L. 594, 104 A. 91.

[Action by the Spencer Heater Company against Randolph Abbott, trading, etc., as the Park Floral Company. Judgment for defendant, and plaintiff appeals.]

TRENCHARD, J. This action was brought on a mechanics' lien claim to recover the price of certain Spencer steam heaters furnished to the defendant, together with some smaller items of labor and expense.

The defendant is a florist. He admitted that the claim was unpaid, and, with his answer, filed a counterclaim for loss of profits on plants, and for expenses, caused by the alleged failure of the plaintiff to perform its contract to furnish heaters adequate to heat the defendant's greenhouses. The jury rendered a verdict for the defendant, and the plaintiff appealed from the consequent judgment. * * *

The evidence tended to show that what * * * occurred was this: * * * The plaintiff, at the request of the defendant, sent its salesman to the defendant's place for a consultation as to the number and sizes of heaters required for the defendant's

purposes. The salesman went there, examined the premises, took measurements, and told the defendant (who disclaimed any knowledge of the number and sizes required) that a No. 11 and a No. 12 would supply the heat required, and agreed to furnish them. Now the question whether or not a statement or affirmation accompanying a sale is a warranty depends upon whether the conditions were such that the vendee had a right to understand, and did understand, that what was said by the vendor was meant as a warranty. A decisive test is whether the vendor assumes to assert a fact of which the buyer is ignorant, or merely states an opinion or judgment upon a matter of which the vendor has no special knowledge, and on which the buyer may be expected also to have an opinion, and to exercise his judgment. In the former case there is a warranty; in the latter, not. * * * Tested by that rule, it was open to the jury to find (as they did) that the plaintiff warranted the heaters to do the work the defendant required. * * *

In the present case the evidence tends to show that after the heaters furnished had failed to do the work, the facts and circumstances were brought to the attention of the manager of the plaintiff. * * * He acknowledged that the trouble was due to the mistake of their agent, offered to pay the expense of a temporary makeshift, proceeded to install adequate heaters, and all without any repudiation of the acts of their salesman. We think, therefore, that the motion for a direction was properly denied.

But we think the learned trial judge erred in his charge respecting the measure of damages. It was a part of the defendant's business to force plants into bloom to make them ready for the winter and early spring markets, and for that purpose he required heat in his greenhouse of a certain temperature. It was open to the jury to find that the plaintiff knew this, and contracted to furnish heaters for that purpose, and failed in the performance of that contract. The trial judge directed the jury to consider the retail price of the flowers, what it would cost to replace them, and all the surrounding circumstances. But we think that was an inaccurate and misleading statement of the measure of damages in a case of the retardation in the development of plants for a particular market. The true measure of damage was the difference between the

market value of such plants in the winter and early spring markets and their market value when they were in fact matured. * * *

The judgment will be reversed and a *venire de novo* awarded.

* * *

3. THE RELIANCE BY THE BUYER

The affirmation of fact must have been relied on by the buyer, to give an action for breach of warranty. If the buyer has knowledge of the falsity of the affirmation, and yet buys, he has waived the warranty. But mere opportunity of knowledge will not amount to a waiver. The buyer may omit a detailed inspection and rely on the warranty.

MEICKLEY v. PARSONS et al.

Supreme Court of Iowa, 1885. 66 Iowa 63, 23 N.W. 265, 55 Am.Rep. 261.

ADAMS, J. There was evidence tending to show that the plaintiff expressly warranted the brick "to be good brick and all right;" that they in fact were not all good; that there were in the kiln between 45,000 and 50,000 brick, and that about 10,000 were worthless; that the purchaser saw the exterior of the kiln, and that the brick upon the outside appeared to be good, but upon the removal of a portion of them there was revealed what the witnesses call a "cold spot," where the brick had been imperfectly burned; that the "cold spot," or defective part of the kiln, could have been discovered by the purchaser, but not without going upon the top of the kiln, and the kiln was covered with three thicknesses of boards, and some brick and other things, and the purchaser did not go upon the top of the kiln. The court instructed the jury that "if, by the exercise of ordinary care at the time of the purchase, he (the purchaser) might have discovered and known the character, quality, and number of brick in the kiln, and failed to do so, he cannot recover because of a breach of warranty." The giving of this instruction is assigned as error. In our opinion the instruction cannot be sustained.

In Benj. Sales, § 616, the author says: "A general warranty does not usually extend to defects apparent on simple inspection,

requiring no skill to discover them, nor to defects known to the buyer." Some of the authorities speak of the defects which are not covered by a warranty as those which are patent or obvious. The doctrine seems to be that the warranty as to such defects is waived. The court may presume, ordinarily, that that was the understanding. But we cannot think that the purchaser who has bought with a warranty is to be careful in order to avoid a waiver of it. The purpose of exacting a warranty may be to exempt the purchaser from the necessity of diligence. The court below was perhaps misled by a rule which applies in a different kind of a case. Where the question is as to whether a representation was understood to be a warranty or a mere expression of opinion, it may be important to inquire whether the purchaser could, in the exercise of ordinary diligence, have formed his own opinion. Where a purchaser forms his own opinion, or might be expected to do so, it is the right of the seller to insist that his representation was a mere expression of opinion. But the case before us is not one of representation, where the words used might or might not be a warranty, according to circumstances. The instruction concedes the fact of warranty. Now, the brick being warranted, the purchaser, we think, might feel excused from exercising the care to discover the defect, in the kiln which he, or a prudent purchaser, would probably have exercised if buying without a warranty. * * *

Reversed.

McCORMICK et al. v. KELLY.

Supreme Court of Minnesota, 1881. 28 Minn. 135, 9 N.W. 675.

DICKINSON, J. This action was brought to recover the amount of a promissory note made by the defendant to the plaintiffs for part of the purchase price of a harvester purchased by the former from the latter. The making of the note is not in issue; the only defense asserted being in the nature of a counter claim for damages from an alleged breach of warranty, on the part of plaintiffs, in respect to the harvester.

By his answer the defendant avers that he first took the machine on trial, and upon the trial it proved to be unsatisfactory and would not do good work, and that he notified the plaintiffs

to take the machine away; whereupon the plaintiffs promised and agreed with the defendant to put the machine in good order and to furnish certain parts of the machine new, and warranted the machine to be well made, of good material, durable, and not liable to break or get out of order; that it would cut and elevate grain as well as any other machine, and was in all respects a first-class machine, and capable of doing first-class and satisfactory work as a harvesting machine; relying upon which promises, agreements, and warranties, defendant purchased the machine, giving the note in question. * * *

The court further instructed the jury in the following language: "A vendor may warrant against a defect that is patent and obvious. * * You sell me a horse, and you warrant that horse to have four legs, and he has only three. I will take your word for it." The court then read in the hearing of the jury the following from Addison on Contracts: "When a general warranty is given on a sale, defects which were apparent at the time of the making of the bargain, and were known to the purchaser, cannot be relied on as a ground of action. If one sells purple to another, and saith to him, 'This is scarlet,' the warranty is to no purpose, for that the other may perceive this; and this gives no cause of action to him. To warrant a thing that may be perceived at sight is not good." The court then said to the jury: "Gentlemen, that is not the law of this state."

The court erred in these instructions to the jury. It has always been held that a general warranty should not be considered as applying to or giving a cause of action for defects known to the parties at the time of making the warranty, and both the weight of authority and reason authorize this proposition, viz., that for representations in the terms or form of a warranty of personal property no action will lie on account of defects actually known and understood by the purchaser at the time of the bargain. * * *

In the nature of things one cannot rely upon the truth of that which he knows to be untrue; and to a purchaser fully knowing the facts in respect to the property, misrepresentation cannot have been an inducement or consideration to the making of the purchase, and hence could have been no part of the contract.

It has often been said that a general warranty may cover patent defects, and it has led to some misapprehension of the law. The proposition is strictly true, but * * * It is "confined to those cases of doubt and difficulty where the purchaser relies on his warranty and not on his own judgment." It has no application to the case of a purchaser who knows the defects in the property and the untruthfulness of the vendor's representations. We do not, however, mean to say there may not be a warranty against the future consequences or results from even known defects. * * *

Order reversed, and a new trial awarded.

SECTION 2.—IMPLIED WARRANTIES

(1) IMPLIED WARRANTIES IN GENERAL

An implied warranty is one that arises from an inference coming from the circumstances and character of particular types of sales transactions. In contrast with express warranty, which is proved by introducing in evidence the very wording of the contract itself, which is such as to carry the meaning that the seller warrants certain facts to the buyer, the implied warranty is proved, not by words directly expressing it, but rather by the fact that the transaction is such as to indicate that the parties must have intended the obligation of a certain type of warranty to attach or is a type of transaction to which the law, without consulting the actual intention of the parties to include such a warranty, treats the warranty as impliedly attaching to the transaction.

The law of sales of personal property recognizes the following kinds of implied warranty: The implied warranty of title, the implied warranty that goods correspond with the description, the implied warranty that goods correspond with the sample, the implied warranty of merchantability, the implied warranty that the goods are reasonably fit for a particular purpose, and any implied warranty annexed by custom, usage of trade, or the habit of dealing between the parties.

While express warranties grow directly out of the words used by the parties in their agreement, implied warranties arise from the nature and circumstances of the transaction. They arise from the inference that the parties may well be taken to have intended a given type or warranty, or they may arise from a rule of law annexing an implied warranty to certain types of sales transaction. In general, it may properly be said that rules of law, which perhaps sometimes seem to force the implication of warranties rather arbitrarily, are really annexing warranties only in the interest of what reasonably seems to be justice in a case of the particular type. These implied warranties are largely an expression of the reaction of business men to centuries of experience in transactions with sellers not careful to meet their obligations in seeing that buyers were treated fairly, or with sellers so dishonest as to perpetrate frauds as to title, quality, and other essentials. It is true that the seller not fulfilling his warranty and, by the same shortcoming, committing a fraud, theoretically is liable in an action in tort, brought for his fraud; but actually a tort action for fraud is often an ineffective means of getting damages from a defrauding seller, because of the frequent inability to prove fraudulent intent on the part of the seller. For this reason, a court action for breach of warranty is often the best remedy against even a defrauder; the plaintiff having only to prove breach of the warranty and the damages.

(2) IMPLIED WARRANTY OF TITLE

In a contract to sell or a sale, unless a contrary intention appears, there is: (1) An implied warranty on the part of the seller that in case of a sale he has a right to sell the goods, and that in case of a contract to sell he will have a right to sell the goods at the time when the property is to pass. (2) An implied warranty that the buyer shall have and enjoy quiet possession of the goods as against any lawful claims existing at the time of the sale. (3) An implied warranty that the goods shall be free at the time of the sale from any charge or encumbrance in favor of any third person, not declared or known to the buyer before or at the time when the contract or sale is made. (4) This section shall not, however, be held to render liable a sheriff, auctioneer, mortgagee, or other person profess-

ing to sell by virtue of authority in fact or law goods in which a third person has a legal or equitable interest.

Where a person in possession of any chattel or article of personal property undertakes to sell the same to another, as a term of the contract of sale he impliedly warrants to the buyer, by the very act of sale, that he is the owner of the property, absolute and free from liens or incumbrances of others. By this implied warranty, the innocent buyer of stolen property, reclaimed by its true owner, may always have a remedy against the person who sold to him. Thus it always behooves a buyer, where any doubt exists as to the true ownership of the article to be purchased, to satisfy himself of the responsibility of the seller.

Circumstances may negative any implied warranty of title. For example, suppose A sells to B a patent of a mechanical device, and B later sues A to recover the consideration, alleging that A was not the true or first inventor thereof. B would have no cause of action, for the parties dealt with equal knowledge and opportunity to discover the validity of the patent. Under such circumstances, there is no implied warranty of title.

On the other hand, if A sells to B a stolen automobile, both A and B acting innocently, A has impliedly warranted that he owns the car and is liable to B.

(3) IMPLIED WARRANTY THAT THE GOODS SHALL CORRESPOND WITH THE DESCRIPTION

Where there is a contract to sell or a sale of goods by description, there is an implied warranty that the goods shall correspond with the description; and, if the contract or sale be by sample, as well as by description, it is not sufficient that the bulk of the goods corresponds with the sample if the goods do not also correspond with the description.

“Description,” as here used, may refer to an expression indicating the identity or type of the goods sold, or the description may refer to an attribute that figures in the determination of quality.

If A contracts to sell B a case of greenhouse tomatoes, which would be tomatoes grown and ripened in a greenhouse, A cannot fulfill the contract by supplying hothouse tomatoes, which are ripened by steam and are usually of an inferior flavor. If A orders of B a case of red salmon and B accepts the order, B cannot fulfill his contract by sending pink salmon. In such instances, the implied warranty of description is broken. Also, in both these instances, the quality of goods, if as supposed in the two above hypothetical cases of breaches, would be inferior to what it would be if the goods corresponded with the descriptions. Frequently, however, the implied warranty that goods shall correspond with the description does not bring into issue any facts having to do with quality either directly or indirectly, for all that this warranty really implies is that the goods shall be as the seller has described them, whether such goods are better or worse than goods of other possible descriptions. So where A sells B a safe described as a "fireproof safe," any safe fulfilling the description as such description is usually interpreted in the market meets the implied warranty of description; and it is not implied that the safe is warranted to be a full protection against every possible fire.

(4) IMPLIED WARRANTY THAT THE GOODS SHALL CORRESPOND
WITH THE SAMPLE

In the case of a contract to sell or a sale by sample:

- (a) There is an implied warranty that the bulk shall correspond with the sample in quality.
- (b) There is an implied warranty that the buyer shall have a reasonable opportunity of comparing the bulk with the sample.
- (c) If the seller is a dealer in goods of that kind, there is an implied warranty that the goods shall be free from any defect rendering them unmerchantable which would not be apparent on reasonable examination of the sample.¹

¹ Uniform Sales Act, § 16.

GASCOIGNE et al. v. CARY BRICK CO.

Supreme Judicial Court of Massachusetts, 1914.
217 Mass. 302, 104 N.E. 734, Ann.Cas.1917C, 336.²

[Action by Joseph Gascoigne and another against the Cary Brick Company. There was a verdict for plaintiffs, and both parties bring exceptions.]

BRALEY, J. It is unquestioned that delivery was free on board at the place where the bricks were to be used, and that the wall, after its erection, because of the variation in color, proved unacceptable to the supervising architect, and the plaintiffs under their contract with the owner were obliged to demolish and rebuild it. The defendant, although promptly notified of the imperfections upon discovery, contends that the sale was for a quality of bricks known to the trade as "up and down hard brick," wherein uniformity of color is not contemplated, and asked the presiding judge in the first, second, third and sixth requests to rule that, as there was no express or implied affirmation of quality, and the defendant was not charged with fraud, the plaintiffs must be presumed to have bought on their own judgment. * * *

But these requests could not be given. The contract was not confined to the correspondence. The letters as the jury properly could find were merely preliminary to the interview between the plaintiffs and the defendant's representative, when the terms of sale were settled, and the order for the bricks given. It is in the evidence of what then took place that the contract must be sought. The testimony is irreconcilable, and the jury were to determine whom they would believe. If they accepted the plaintiffs' statements, the defendant's agent having been informed that, as both sides of the wall would have to be faced, the facings necessarily would have to be of a uniform shade or appearance, similar to the brick exhibited which the architect had accepted as of the required color, replied that he knew what the requirements were, and that the defendant would furnish the bricks accordingly. The order thereupon given and accepted the jury could say constituted a sale, where the plaintiffs relied on the statements of the seller, and the defendant

² Statement of facts is omitted.

impliedly warranted that the bricks delivered in bulk should correspond with the sample. * * * St.1908, c. 237, § 16. If these terms were found to constitute the contract, the evidence was plenary that the shipments did not conform to the sample in quality; the plaintiffs therefore could recover damages, and the fourth and fifth requests were inappropriate. * * *

The plaintiffs, although they prevailed, are dissatisfied with the rulings as to the measure of damages. By the acceptance of title the plaintiffs did not as matter of law release the defendant, or bar their claim for damages. St.1908, c. 237, § 49. It was a question of fact whether they waived the warranty and took the bricks as they found them on the cars, a negative answer to which has been established in their favor by the verdict. * * * But if they knew or ought to have known of the defective coloring, no damages caused by the use of the bricks can be recovered. * * * The jury were to determine whether by reason of moisture caused by the weather the bricks at the time of delivery, and when placed in the wall had taken on and retained a darker appearance, rendering it difficult to ascertain their true or natural color, and if this appeared, whether the plaintiffs, who might rely on the presumption that the defendant would perform its contract, had acted with reasonable diligence in using the bricks without further inspection, or whether the general appearance was such that imperfections would not have been disclosed by an extended examination. A conclusion that no negligence had been shown, in connection with the uncontradicted evidence, that notice was promptly given to the defendant who declined further performance, would warrant the assessment of damages for not only the difference between what the plaintiffs bought, and what they received, but also the expense of taking down and rebuilding the wall. * * *

5. IMPLIED WARRANTY OF FITNESS FOR A PARTICULAR PURPOSE

Where the buyer, expressly or by implication, makes known to the seller the particular purpose for which the goods are required, and it appears that the buyer relies on the seller's skill or judgment (whether he be the grower or manufacturer or not), there is an implied warranty that the goods shall be reasonably fit for such purpose.

If the buyer has examined the goods, there is no implied warranty as regards defects which such examination ought to have revealed.

In the case of a contract to sell or a sale of a specified article under its patent or other trade name, there is no implied warranty as to its fitness for any particular purpose.³

BARNETT v. KENNEDY.

Appellate Court of Illinois, 1942. 315 Ill.App. 28, 42 N.E.2d 298.

Action by C. Edward Barnett and E. G. Barnett, doing business as the United Stokers Company, against G. R. Kennedy, doing business as the Kennedy Laundry, to recover the purchase price of a stoker. From a judgment in favor of the defendant, the plaintiffs appeal.

Judgment affirmed.

FULTON, J. Defendant-Appellee contracted to buy from the appellants one Twin United Stoker and controls pertaining thereto. * * *

A written memorandum of agreement was entered into dated April 20th, 1939. Among other provisions it contained the following preliminary statement: "Whereas, Party of the Second Part (Appellants) has made an engineer analysis of the adaptability of such stoker to the laundry plant, and has made a computation as to the probable consumption of coal in said plant and upon such computation is desirous of installing such stoker in said plant for a trial period of thirty days based upon the following understanding."

After stating the specifications of the stoker and the manner in which payments should be made, the contract was premised on the condition that installation of the stoker would save defendant 20% on the coal tonnage. * * *

A great deal of testimony was introduced showing continued difficulty with the new plant and it is quite apparent that it never worked satisfactorily and never saved anything by way of fuel consumption. Appellee knew nothing about the construction or

³ Uniform Sales Act, § 15(1, 3, and 4).

operation of a stoker and left everything to the judgment of appellant. * * *

Chapter 121½, Par. 15, § 1, Ill.R.S.1941, provides: "Where the buyer, expressly or by implication, makes known to the seller the particular purpose for which the goods are required, and it appears that the buyer relies on the seller's skill or judgment (whether he be the grower or manufacturer or not), there is (an) implied warranty that the goods shall be reasonably fit for such purpose."

Appellee was in the laundry business. He was approached by one of the appellants who sought to sell him a Twin Stoker that would operate more efficiently than firing his boiler by hand, and after considerable urging signed a contract for the purchase of the stoker, which was subsequently installed. There is testimony by many witnesses that the stoker never worked properly. The fireman in charge of the plant stated that when hand firing he could raise the steam pressure to 100 pounds in one hour but with the new stoker it took him two hours to get 60 pounds pressure, and that the steam pressure was insufficient to operate the laundry successfully. Clinkers formed in large masses because of the intense heat in the fire box. This condition frequently caused the sheering of the pins and replacement of new ones. Other defects were testified to and not denied. The cost of coal was not reduced and Mr. Barnett, one of the appellants, was appealed to on repeated occasions to remedy the difficulties. For several months the appellee relied upon the said appellant to place the plant in good working order but finally notified him to remove the same and restore the heating plant to its original status. * * *

Appellants knew when the sale was made for what purpose the stoker was intended. Furthermore, they were given every opportunity to remedy the defects but failed to do so. * * *

The Court was fully warranted from the testimony in finding the existence of an implied warranty in this case. * * *

STANTON v. SEARS ROEBUCK & CO.

Appellate Court of Illinois, 1942. 312 Ill.App. 496, 38 N.E.2d 801.

Action for breach of implied warranty of fitness by Marie Stanton against Sears Roebuck & Company, a corporation. From

a judgment for the defendant notwithstanding the verdict for the plaintiff, plaintiff appeals.

Affirmed.

BURKE, Presiding Justice. Defendant is a retailer of merchandise. On October 29, 1936, plaintiff bought two black rayon dresses from defendant at its store located at State and Van Buren Streets, Chicago. She purchased them for her personal use. She enjoyed good health and had not suffered from any skin disease. She had been wearing black rayon dresses for a number of years prior to the time of such purchase and had not suffered any injury or skin disease as a result of wearing that type of dress. She was employed as a cashier in a cafeteria and her employer required that she wear black dresses. After wearing one of the dresses about two weeks she became ill and developed a skin disease known as "dermatitis". She consulted physicians who treated her for a long period of time. Because of the "dermatitis" she was unable to work for several years. She testified that after she wore the dress two weeks her arms got sore, the skin became blistered and inflamed from the waist up, including her arms and shoulders, the pores were filled with "black stuff", the blisters were wet, water was coming out of them and the pores were filled with dye.

For many years defendant handled millions of black rayon garments annually, including dresses of the type purchased by plaintiff. It purchased these garments from large reputable and reliable manufacturers who sell to the trade generally. Never before had any complaint of a reaction or ill effect come to the defendant from any of the purchases of black rayon garments. During the year preceding the sale of the two dresses, defendant sold half a million dresses of the same type. A trial resulted in a verdict for the plaintiff in the sum of \$1,500. Defendant's motion for a judgment notwithstanding the verdict was allowed. Plaintiff appeals and asks that we enter judgment in her favor. * * * Plaintiff advances the argument that a retail dealer in women's dresses is liable on an implied warranty where it sells a dress to a woman who suffers injuries from poisonous dyes in the dress, of which poisonous dyes the woman had no knowledge. Defendant answers that a vendor is not liable upon any theory, whether it be warranty or

negligence, to a purchaser of a garment not shown to contain any harmful or poisonous substance who suffers a reaction by coming in contact with such garment due to some peculiar idiosyncrasy, allergy or sensitivity. Plaintiff relies on an implied warranty that "the dress she bought was suitable for the purpose for which she bought it, and that the said dress contained nothing that would be injurious to her health if she wore it." She cites Par. 1 of § 15, Ch. 121½, Ill.Rev.Stat. 1941, which reads: "Where the buyer, expressly or by implication, makes known to the seller the particular purpose for which the goods are required, and it appears that the buyer relies on the seller's skill or judgment (whether he be the grower or manufacturer or not), there is an implied warranty that the goods shall be reasonably fit for such purpose." Plaintiff insists that it is the duty of the seller to know that the goods he is selling are not injurious to the customer, and that in the instant case the plaintiff disclosed that the dress was for her own use. Plaintiff asserts that she relied upon the implied warranty that she could wear the dress without injury to herself. * * *

Defendant relies on the testimony of the two physicians introduced by plaintiff. They testified that Mrs. Stanton was possessed of a peculiar and rare personal idiosyncrasy commonly known as an allergy, or sensitivity to certain substances. Both testified that countless other women could have worn the dress without any reaction or ill effect whatever. The record does not disclose that any chemical analysis of the dress was made by either of the parties to the action. There was no evidence that the dress contained any harmful or poisonous substance. After discovering her plight, plaintiff gave one of the two black rayon dresses to her sister. The sister found it to be too small. There is no evidence that the sister suffered any discomfort from wearing it. * * * According to the testimony of the doctors, there are various types of allergy. It may arise from eating such food as chocolate, strawberries and eggs, from breathing some substance, or from coming in contact with something. Various persons may be allergic to various things. The plaintiff's case fell within the type of allergy which results from contact with certain substances. Dr. Donlon testified that an allergy meant a sensitivity to something one way or another; that sensitivity of the skin in some persons might result from

contact with a substance; that countless other people might come in contact with the same substance without having any ill effect or reaction. He testified that plaintiff's condition was such that when she came in contact with a black rayon dress she developed a skin reaction due to her own peculiar sensitivity. We have sifted through the numerous cases cited by the respective parties. In the case of Barrett et al. v. S. S. Kresge Co., 144 Pa.Super. 516, 19 A.2d 502, 503, decided by the Pennsylvania Superior (Appellate Court) in April, 1941, wherein the facts are strikingly similar to the facts in the case at bar, the court said:

"In none of the food and beverage cases, however, was there proof that a plaintiff was peculiarly allergic to something not harmful to others. In each there was the presence of a poison or irritant that undoubtedly was intolerant and injurious to the average person. It is well known that some people are so constituted that they cannot eat fish, strawberries, eggs, and many other foods that could be mentioned, without ill effects. It can hardly be said that a vendor thereof would be liable for a breach of an implied warranty solely because of the harmful effect due to a buyer's individual idiosyncrasy."

In the Barrett case the court also discussed the applicability of Section 15 of the Uniform Sales Act, (Par. 1, § 15, Chap 121½, Ill.Rev.Stat. 1941) and said: "We do not conceive that the legislature intended under the Act of 1915 [Par. 1, Sec. 15, Uniform Sales Act] that a retail vendor of wearing apparel obligates himself by an implied warranty that the merchandise he offers for sale, although harmless to practically all the public, does not contain any substance or ingredient that may injuriously affect some individual purchaser, who has a peculiar susceptibility unknown to the vendor. This, in effect, is appellant's theory. If sound, it would mean that many merchants have a far reaching and possibly, a ruinous liability, which they cannot anticipate or with reasonable precaution avoid."

From a careful study of the testimony, the cases cited and the arguments presented, we are convinced that plaintiff failed to produce any evidence that the defendant violated any duty owing to her. Plaintiff failed to prove that defendant was guilty of negligence, and Par. 1 of § 15 of the Uniform Sales Act is not applicable to the factual situation presented by the

record. The court was right in entering judgment notwithstanding the verdict and the judgment of the Circuit Court of Cook County is affirmed.

MILCOR STEEL CO. v. GRANTIER.

Schoharie County Court of New York, 1942. 35 N.Y.S.2d 822.

Action by the Milcor Steel Company against Charles Grantier and another, individually and as copartners doing business under the name and style of Grantier Hardware & Implement Company, for part of the purchase price of metal roofing in which defendants filed a counterclaim for breach of implied warranty. Judgment for the defendants on the counterclaim, and plaintiff appeals.

Affirmed.

WHARTON, J. This is an appeal by the plaintiff from a judgment entered upon the defendant's counterclaim, based upon a breach of implied warranty. The action was brought for a portion of the purchase price of a quantity of metal roofing. There is no question as between the buyer and seller concerning the purpose for which the roofing was to be used. Under Section 96 of the Personal Property Law it appears that an implied warranty would exist that the goods be reasonably fit for the purpose intended and that they should be of merchantable quality. The purchaser had a right to expect at least a medium quality of goodness in his purchase.

It appears that the roofing in question was laid in 1933 and during the fourth year of its use or in 1937 the owner noted evidence of rusting. This situation was called to the attention of the defendant dealer, who in due course notified the plaintiff. The record indicates that the plaintiff's representative thereupon conducted a personal inspection of the roofing in question and stated that "he had never seen a roof rust like that before and would report back to the Company". Correspondence between the plaintiff and defendant, Exhibits A and B in evidence, substantiates such statement on the part of the plaintiff's representative.

It is a matter of common knowledge and generally accepted that any roofing material properly applied may be expected to

last a substantial portion of an ordinary lifetime. A home owner ordinarily is not required to apply a new roof to his buildings in the course of a few years. Metal roofing unless properly manufactured is subject to rust and deterioration upon exposure to the elements and an ordinary examination of new material could not possibly disclose the absence of rust resisting qualities. As far as this record discloses the passing of time is the only test by which rust resisting qualities can be ascertained.

It is my opinion that the purchaser, being without notice that the roofing was of inferior quality and required painting to keep it from rusting, had a right to rely upon an implied warranty of quality. Clearly, metal roofing known to be subject to rust within four years could not be considered as of merchantable quality. It appears that the merchandise in question was not reasonably fit for the purpose for which it was intended. * * *

QUEEN CITY GLASS CO. v. PITTSBURG CLAY POT CO.

Court of Appeals of Maryland, 1903. 97 Md. 429, 55 A. 447.

MC SHERRY, C. J. This suit was brought by the Pittsburg Clay Pot Company, a body corporate, against the Queen City Glass Company, also a corporation, to recover the price of seventeen clay pots sold by the former to the latter.

The Clay Pot Company is engaged in the manufacture of clay pots for use in glass factories. The Queen City Glass Company carries on the business of making glass bottles. In the prosecution of that business, clay pots about five feet high, four feet wide, with walls four inches thick, are used to melt and hold the materials of which glass is composed. The clay pots, when shipped from the establishment where they are made, are unburnt. When needed for use by the glass factory they are placed in what is called a pot arch and subjected to an intense heat reaching two thousand degrees, and are kept there for several days. This process is called annealing. When annealed, the pots are quickly transferred from the pot arch to the glass furnace, where they are filled with the materials out of which glass is made, and those materials are brought by the heat to a molten state, so that the glass blowers may fashion and

shape the glass into bottles. In the process of annealing, some eight or nine of the seventeen pots, for the price of which this suit was brought, cracked, broke, warped, bulged, or melted down and flattened out in the pot arch and thus were rendered useless; whilst four or five of them, which had stood the annealing, cracked and broke in the glass furnace after two or three fillings, and the remainder lasted a much shorter time than such pots should be serviceable. It was shown in evidence that when the pots broke in the glass furnace, the molten glass which they contained was spilled and wasted, causing a loss of two hundred dollars, and the molten material ran down into the eye of the furnace, cut the gratebars and damaged the furnace to such an extent as to necessitate the expenditure of one hundred and fifty dollars for repairs. It was further shown that the employees of the Glass Company were skillful and competent and they had used care in annealing the pots. It was proved that the pots were made of clay brought from Germany, Missouri, Kentucky, Pennsylvania, and other places and that other ingredients were used in mixing the clay according to a secret formula known to the Pittsburg Company. In the nature of the case therefore it was impossible for the purchaser to discover any defects in the pots before they were placed in the annealing furnace, because no inspection could reveal any imperfections in their make-up or in the composition of the material of which they were constructed. The evidence further showed that inasmuch as nothing could be discovered by inspection, about the quality of the pots or as to their fitness for the use for which they were intended, the Glass Company was compelled to trust to and rely upon the manufacture and the manufacturer for their quality and fitness; and that the Pittsburg Company knew exactly to what use the Glass Company intended to apply them and what treatment in heating them would be necessary to put them in condition for use in the glass furnace. * * *

The prayer granted at the instance of the plaintiff, the appellee in this court, proceeded upon the theory that if there was an express or implied warranty on the part of the vendor it was a warranty that the "pots were reasonably fit for the purpose of being heated in" the "retort or annealing furnace to be prepared for use in the melting of glass." * * * [An im-

plied warranty arises out of the circumstance of this case.] This court adopted and approved the proposition laid down in Jones v. Just, L.R. 3 Q.B. 197, as follows: "Where a manufacturer contracts to supply an article which he manufactures to be applied to a particular purpose, so that the buyer necessarily trusts to the judgment or skill of the manufacturer, there is in that case an implied term or warranty, that it shall be reasonably fit for the purpose to which it is to be applied. In such a case the buyer trusts to the manufacturer or dealer and relies upon his judgment and not upon his own." * * *

We think it is quite clear that the proposition just quoted is applicable. The evidence already referred to, if credited by the jury, demonstrates that the purchaser was compelled to rely on the skill and judgment of the manufacturer. * * * The clays were mixed according to a secret formula and they were made into form and shape by hand, the process involving the addition of successive layers of the material. * * * Actual use of the pots was the sole method by which a defect could be discovered. They were manufactured for a special purpose which was known to the vendor and the vendee was bound to trust to the manufacturer and to rely on his judgment. There could not well be a condition of circumstances more obviously within the doctrine of implied warranty. * * *

Judgment reversed, with costs above and below, and new trial awarded.

COMMERCIAL REALTY & CONSTRUCTION CO. v.
DORSEY.

Court of Appeals of Maryland, 1910. 114 Md. 172, 78 A. 1099.

Action by William C. Dorsey against the Commercial Realty & Construction Company. From a judgment for plaintiff, defendant appeals.

SCHMUCKER, J. The appeal in this case was taken from a judgment of the superior court of Baltimore city against the appellant company in a suit on a contract for the supply of building materials.

The company, on the eve of the erection of a row of small buildings in Baltimore city, entered into a written contract

with the appellee, William C. Dorsey, on December 9, 1908, to supply it with the requisite quantity of certain kinds of lumber and millwork, at specified prices, for the buildings. The negotiations were made, and the contract was signed on behalf of the company of Abel Rosenthal, its president, and its corporate seal was affixed thereto. It was also signed, but not sealed, by Dorsey. * * *

There is evidence in the record on behalf of the plaintiff tending to show that Rosenthal, when he looked at the lumber in Dorsey's yard, for the purpose of purchasing material to be used in the erection of the houses, informed Dorsey that the company wanted cheap lumber, and that he was then shown by Dorsey the identical lumber which was afterwards delivered under the contract, and that he agreed to buy it, and that the contract prices for it were made low because of its low quality.

* * *

The fourth paragraph denied the defendant's right to recoup either the item of \$75 of alleged loss from the defective quality of certain joists supplied by the plaintiff. * * * The law upon this subject received consideration by us in Queen City Glass Co. v. Clay Pot Co., 97 Md. 429, 55 A. 447, where we, quoting with approval from the cases of Jones v. Just, L.R. 3 Q.B. 197, and Rice v. Forsyth, 41 Md. 403, and relying upon other cases there cited, said: "Where a manufacturer contracts to supply an article which he manufactures to be applied to a particular purpose so that the buyer necessarily trusts to the judgment or skill of the manufacturer, there is in that case an implied term or warranty that it shall be reasonably fit for the purpose to which it is to be applied. In such a case the buyer trusts to the manufacturer or dealer and relies upon his judgment and not upon his own."

We have held with equal clearness that, where the seller is not the manufacturer of the article sold and the buyer has an opportunity of examining it, there is no implied warranty, in the absence of fraud, that it shall be fit for the purpose for which it was bought. In such cases, if there be no express warranty, the doctrine of caveat emptor applies, and the buyer, not having seen fit to exact a warranty, takes upon himself the risk as to quality. Horner v. Parkhurst, 71 Md. 116, 17 A. 1027.

* * *

In the case now before us it is not contended that the contract sued on contained any express warranty, and, as the joists, alleged to have been defective, were merely commercial lumber, and not goods manufactured by the seller, and the buyer had ample opportunity to inspect them after they were delivered before using them, there was no implied warranty, but he must be regarded as having assumed the risk of their quality. * * *

For the reasons mentioned by us, we will affirm the judgment appealed from. * * *

GRAND AVENUE HOTEL CO. v. WHARTON et al.

Circuit Court of Appeals of the United States, Eighth Circuit, 1897. 79 F. 43.

[This was an action for the purchase price of certain boilers, sold to the defendant hotel corporation by the plaintiff. Defendant sets up breach of implied warranty, by way of recoupment or set-off to plaintiff's claim. It appeared from the evidence that defendant ordered two "Harrison safety boilers" of 150 horse-power each from the plaintiff. The order contained specifications of material and construction. The boilers were shipped and installed. It was found that the boilers were not available to use with the water from the Missouri river on account of the sediment therein. It was contended by the defendant that, since plaintiff knew for what particular purpose the boilers were to be used, and knew that they were to be supplied with Missouri river water, there was a warranty that the boilers would be fit for the purpose.]

LOCHREN, District Judge. Where a manufacturer contracts to supply an article which he manufactures to be applied to a particular use of which he is advised, so that the buyer necessarily trusts to the judgment and skill of the manufacturer, there is an implied warranty that the article shall be reasonably fit for the use to which it is to be applied. * * *

But when a known, described, and definite article is ordered of a manufacturer, although it be stated by the purchaser to be required for a particular use, yet if the known, described, and definite thing be actually applied, there is no implied warranty that it shall answer the particular purpose intended by the buyer.
* * *

[In the case before us] the purchaser contracted for a definite, well-known kind of boiler. * * * The specifications as to the size, form, material, and every detail were minute, and embodied in the contract. The manufacturers were obligated to deliver exactly such boilers as were described and contracted for, and could not, under the contract, deliver anything different. There is no claim that the boilers did not in every respect conform to this contract and specifications, nor any claim that they were defective, either in respect to workmanship or material. The purchaser did not exact a warranty that the boilers would operate with the muddy waters of the Missouri river, and therefore assumed that risk itself. The writing must, on familiar principles, be held to embody the entire contract obligations of the parties, and all negotiations and colloquies of the parties preceding the execution of the writing were immaterial. The surrounding circumstances might be considered in applying the terms of the contract, or in the interpretation of doubtful terms, but not for the purpose of adding terms not contained in the writing. There was nothing doubtful or uncertain in the terms of this written contract. There were no errors in the rulings of the court, and the judgment is affirmed.

6. IMPLIED WARRANTY OF MERCHANTABILITY

Where the goods are bought by description from a seller who deals in goods of that description (whether he be the grower or manufacturer or not), there is an implied warranty that the goods shall be of a merchantable quality.⁴

In the case of a contract to sell or a sale by sample, if the seller is a dealer in goods of that kind, there is an implied warranty that the goods shall be free from any defect rendering them unmerchantable which would not be apparent on reasonable examination of the sample.⁵

ILLUSTRATIONS

1. A sold to B 3,000 cans of condensed milk, for the purpose of resale by B. Upon delivery to B, it was found that 1,000 cans were labelled "Nissly," which was an infringement of the trade-name of the Nestle Company. In order to avoid trouble

⁴ Uniform Sales Act, § 15(2).

⁵ Uniform Sales Act, § 16(c).

with the Nestlè Company, B removed the labels and sold the milk unlabelled at a loss. Held that B could recover damages from A for breach of the implied warranty of merchantability.⁶

2. C, a British manufacturer, sold to D a large quantity of "Webb's Indian Tonic," which, as C knew, was to be shipped to Argentina. Without the knowledge of D, the tonic contained a slight amount of salicylic acid, which fact made it illegal to sell such an article in Argentina. C did not know that Argentina forbade such sale. The government of Argentina having condemned the tonic, D brought action against C for breach of implied warranties of merchantability and of fitness of purpose. Held that D cannot recover. There was no implied warranty that the goods could be sold legally.⁷

3. E sold to F, a wholesale grocer, 700 cases of sardines. Held that there is an implied warranty of merchantability. "If the goods in the case at bar were not salable for some price as sardines when they were delivered to the plaintiff, there was a breach of contract by the seller."⁸

SECTION 3.—THE WARRANTIES EXTEND ONLY TO THE IMMEDIATE PURCHASER

Where an article of known manufacture is made by one not the vendor, and the vendee knows this fact, there are no implied warranties from vendor to vendee.

REYNOLDS et al. v. GENERAL ELECTRIC CO. GENERAL ELECTRIC CO. v. REYNOLDS et al. REVENUE TUNNEL MINES CO. v. GENERAL ELECTRIC CO. GENERAL ELECTRIC CO. v. REVENUE TUNNEL MINES CO.

Circuit Court of Appeals of the United States, Eighth Circuit, 1905. 141 F. 551.

[This was an action for the purchase price of certain pumps sold by the General Electric Company, plaintiff, to the defendant]

⁶ Niblett, Ltd., v. Confectioners' Materials Co., [1921] 3 K.B. 387.

⁸ Inter-State Grocer Co. v. George William Bentley Co., 214 Mass. 227, 101 N.E. 147 (1913).

⁷ Sumner Permain & Co. v. Webb & Co., [1922] 1 K.B. 55.

ant. The defendant pleaded breach of warranty arising from a latent defect in the material of which the pumps were constructed. It is not denied that defendant at the time the pumps were purchased had knowledge of the fact that the General Electric Company was a mere dealer in the pumps.]

SANBORN, Circuit Judge. * * * It is said that an implied warranty arose from the sale, to the effect that the pump should be fit and proper for the pumping of water in the shaft of a mine, and that this covenant was broken. If the pump was unfit to do the work which machines of that nature ordinarily perform, that condition arose from latent defects in the material of which it was constructed, or in the workmanship bestowed upon it, of which the plaintiff had no notice. The electric company secured and delivered the article of the known manufacture which the mines company had selected, and which was described in the contract. A manufacturer is charged by the law with notice of latent defects in the design, materials, and construction of the machines he makes which unfit them to perform the ordinary work of such articles, because he furnishes the design, the materials, and the workmanship, and thus either causes or permits the defects. Out of this state of facts and an agreement of sale an implied warranty arises on the part of the manufacturer that the machines he makes are suitable for the general purposes for which such articles are commonly used. Goulds v. Brophy, 42 Minn. 109, 112, 43 N.W. 834, 6 L.R.A. 392. But where such a purchaser buys of a dealer a definite machine of known manufacture, which has been, or is to be, made by a builder who is not the vendor, and the vendee knows this fact, there is no implied warranty by the dealer, either against latent defects or that the machine or article will be suitable for the purposes for which such articles are commonly used, because the purchaser has the same knowledge and means of knowledge of these subjects as has the dealer. The vendee knows that they both rely on the character and reputation of the manufacturer.

* * *

[Judgment for plaintiff.]

S. & D., ENG. & ARCH. 3RD ED.

HOYT v. HAINSWORTH MOTOR CO.

Supreme Court of Washington, 1920. 112 Wash. 440, 192 P. 918.

MAIN, J. This is an action for damages for breach of an alleged implied warranty in the sale of an automobile. The case was tried to the court and a jury, and resulted in a verdict for the plaintiff. * * * The defendant appeals. * * *

The appellant is * * * engaged in the business of selling automobiles at Seattle, Wash. On April 5 * * * it sold to the respondent a new 1918 model, six-cylinder Oldsmobile. At the time the car was sold the appellant had on the floor of its showroom this particular car. It did not, however, sell this car, but sold a car of the model described. The respondent saw and looked at the car that was in the showroom. A few days after the respondent had agreed to purchase a car, the appellant delivered to him the car which he looked at in the showroom, and then told him that it was the same car. The respondent operated the car after it was delivered to him for a period of approximately 11 months. The car was defective, in that the pistons were a little too small for the cylinders. The car did not prove to be satisfactory, and after having operated it for the time mentioned the present action was instituted, for the purpose of recovering damages for a breach of implied warranty. It should be noted and kept in mind that the appellant was not the manufacturer of the automobile, but simply a dealer. The theory of the respondent that the sale was not of a particular car, but of a particular model will be adopted.

The appellant claims that, since it was a dealer, and not a manufacturer, in selling the car there was no implied warranty against latent defects. The respondent claims that, since he purchased, not a specific car, but a car of a particular model, even though the appellant were a dealer, there would be an implied warranty against latent defects, such as ordinary inspection would not disclose. The defect in this car was latent, and one that ordinary inspection would not disclose. The controlling question is whether, under the facts stated, the appellant as dealer is liable upon an implied warranty, there being no express warranty. Upon the question as to whether the dealer is liable upon an implied warranty for a latent defect in an article sold, the decisions of the various courts that have passed upon the

question are divided. In some it is held that there is such an implied warranty. The majority of the courts, however, in this country hold that in the case of the dealer, as distinguished from the manufacturer, there is no such implied warranty. Williston on Sales, § 233. This court, in Hurley-Mason Co. v. Stebbins, Walker & Spinning, 79 Wash. 366, 140 P. 381, L.R.A.1915B, 1131, Ann.Cas.1916A, 948, has adopted the majority rule; that is, that a dealer does not impliedly warrant against defects not discoverable by ordinary inspection and tests. * * *

Under the undisputed facts in the present case, there was a sale of an automobile of known manufacture. There is a rule collateral to that above referred to as the majority rule, to the effect that where an article of known manufacture is made by one not the vendor, and the vendee knows this fact, there is no implied warranty by the dealer against latent defects. * * *

There is no escaping the conclusion that the appellant in this case sold to the respondent an article of known manufacture, of which the vendor or dealer was not the builder. The case comes squarely within this rule. The appellant relies upon the rule that, where goods of some specific kind are ordered of the manufacturer or dealer, which the buyer has neither inspected nor selected, there is an implied warranty that the article delivered shall be of fair average quality or goodness according to its kind, and free from remarkable defects. Mechem on Sales, § 1340. But under this rule, as pointed out by the same author in § 1345, before a dealer can be held liable on an implied warranty, the conditions stated in the rule must be present, “* * * namely, an executory agreement by the dealer to supply an article not yet ascertained, but left to be determined by him according to his own judgment, in view of the purpose to be subserved by it as communicated to him by the buyer.”

This case, however, does not come within this rule. Nothing was left to be determined according to the judgment of the appellant, and his duty was fulfilled when he delivered a car of the particular model contracted for. * * *

[Judgment for defendant.]

NEGOTIABLE INSTRUMENTS

Chapter

1. Purpose, Nature, and Forms of Commercial Paper.
 2. Who is a Holder in Due Course?
 3. Rights of Holder against Maker and Acceptor.
 4. Rights of Holder against Prior Indorsers.
 5. Discharge.
-

CHAPTER 1

PURPOSE, NATURE AND FORMS OF COMMERCIAL PAPER

Section

1. In General.
 2. Assignment and Negotiation.
-

SECTION 1.—IN GENERAL

Commercial paper is used for the purpose of transfer of credit. All forms of commercial paper fall into two classes: Bills of exchange and promissory notes.

A bill of exchange is an unconditional order written by one person called the "drawer," upon another, called the "drawee," directing the drawee to pay to a third person, called the "payee," or his order, a stated sum of money. Forms of bills of exchange are: the ordinary bank check, a private bill, bank draft, sight draft, time draft, trade acceptance, bank acceptance.

A promissory note is an unconditional promise in writing to pay a specified sum in money to the order of another, or to bearer.

Interchange of credit being simpler and less hazardous than actual transfers of money, bills of exchange and promissory notes were invented and are used as symbols and evidence of these credit transactions. From such usages there grew in to the body of the common law a set of rules and principles called the

law merchant, which in the United States has been codified into the Uniform Negotiable Instruments Law, now adopted in every state and territory.

Suppose that A, in France, owes B, in England, a thousand dollars, and that B wishes to buy a thousand dollars worth of goods from C, also in France. B writes an order on A, directing him to pay to C one thousand dollars, and sends this written order to C, who presents it to A and secures the money. Thus, by this transfer of credit, both A and B have avoided the trouble and risks incident to the transportation of the money itself.

Furthermore, the bill may pass from hand to hand, to take the place of money for the purchase of goods or the payment of debts, before it is finally discharged by payment by A. C, instead of presenting the bill to A for payment, may transfer his title therein by indorsement and delivery to D, to whom C owes money, and D may do the same to E, and so on until it is finally presented and paid by the drawee, A.

The form of bill of exchange most familiar to every one is the ordinary bank check. A check is a demand bill on which the drawee is a bank.

A bank draft is a bill of exchange in which both drawer and drawee are banks. Like a check, it is always payable on demand.

A trade acceptance is another type of bill of exchange widely used by manufacturers and jobbers of goods. The seller draws a draft on the buyer for the sale price of a shipment, to his own order. He then sends the bill as drawn to the buyer, who is named as drawee. On receipt of the bill the drawee "accepts" it; that is, writes across the face the word "accepted" and adds his signature. This amounts to a promise by the drawee that he will pay the bill according to its terms. The buyer then returns the accepted bill to the seller, who indorses the instrument and either discounts it with a bank or deposits it as collateral for a loan. Thus the seller is enabled to get his money immediately but at the same time extend credit to his customers.

A bank acceptance is like a trade acceptance, except that in this case the bill is drawn on a bank rather than on the buyer of the goods. By previous arrangement the bank agrees with the buyer that it will accept stated drafts to be drawn. For ex-

ample, Smith in New York wishes to buy goods from Brown in Chicago on 90 days' credit. Brown will sell only for cash. Brown's credit is not sufficiently good so that his indorsement of a trade acceptance would make it marketable. So Smith goes to a bank in New York, deposits collateral to protect the bank, and thus secures the bank's agreement to accept the draft. Such draft accepted by a bank would have a stronger credit than a trade acceptance accepted by the buyer. Thus Brown is enabled to sell the draft and obtain cash for his goods, and at the same time Smith is enabled to buy on credit as he desired. The bank is not making a loan, but is merely lending its credit to the buyer.

Following are forms of notes, bills and checks:

1. Negotiable Note.

No. <u>49</u>	New Haven, Conn., <u>June 14, 1945</u>	<u>\$ 5000.00</u>
<u>Two years</u>	after date I or we jointly and severally promise to	
pay to the order of <u>John C. Smith</u>		Dollars
<u>Five thousand</u>		
AT THE FIRST NATIONAL BANK AND TRUST COMPANY OF NEW HAVEN NEW HAVEN, CONN.		
Value Received	<u>Richard Roe</u>	
	Name <u>4 Main St. Greenwich, Conn.</u>	
	Address	

2. Demand Bill of Exchange prior to Acceptance.

No. <u>.....</u>	<u>\$ 8763.00</u>
	<u>June 1, 1941</u>
on demand Pay to	
the order of First National Bank & Trust Company of New Haven	
Eight thousand seven hundred and sixty-three and 00/100 Dollars	
a/c <u>Richard Roe & Co.</u>	
Value received and charge the same to account of	
To: <u>Richard Roe & Co.</u> } <u>Wm. J. Roe, Pres.</u>	
12 Beacon Street } <u>John Roe, Vice Pres.</u>	
Boston, Mass. }	

DANIEL BANK SUPPLY CO. IN FEDERAL ST. BOSTON

3. Time Bill of Exchange after Acceptance.

TRADE ACCEPTANCE	No. <u>1234567890</u>	New Haven Conn. MAY - 5 1941 19
To Richard Roe	(NAME OF DRAWER)	Blank Street Kenton Co.
On Aug 5 1941	PAY TO THE ORDER OF <u>X.Y.Z Corp.</u>	(NAME OF PAYEE)
Due thousand	Dollars (\$1000.00)	
The transaction which gives rise to this instrument is the purchase of goods by the acceptor from the drawer.		
Accepted at New Haven on May 6 1941	<u>X.Y.Z Corp.</u>	
Payable at Second Nat'l Bank.		
Richard Roe		By John Doe Pres.
TRADE ROAD		

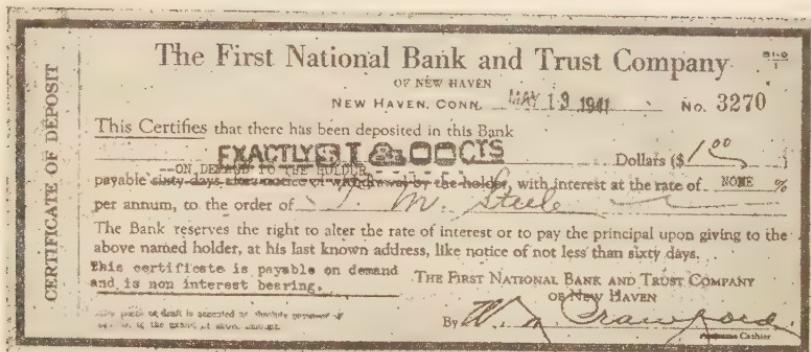
4. Check.

MANUFACTURERS TRUST COMPANY 1-30	
32 UNIVERSITY PLACE	
DAY TO THE ORDER OF	NEW YORK June 14, 1945
John C. Smith \$ 5000.00	
Five thousand DOLLARS	
No. 132 Richard Roe	

5. Certified Check.

THOMAS M. STEELE	The First National Bank and Trust Company NEW HAVEN	
CERTIFIED PAY TO THE ORDER OF	ONE DOLLAR	MAY 13 1941
Our	May 13 1941	May 13 1941 No. 8429
CERTIFIED PAYABLE ONE DOLLAR PRESENTED WITHIN THREE MONTHS FROM THIS DATE WHICH CAN BE SUITABLY ENDORSED PROPERLY ENDORSED	WILCOX	\$ 1.00
THE FIRST NATIONAL BANK & TRUST COMPANY OF NEW HAVEN		
DO NOT DESTROY		
A check or draft is good payment for a sum of money up to the amount stated on it to the extent of available funds.		

6. Certificate of Deposit.



SECTION 2.—ASSIGNMENT AND NEGOTIATION

The assignee of a claim for money takes what his assignor had, no more; i. e., he takes subject to all the defenses that existed against his assignor.

But the holder in due course of a negotiable instrument takes the same free from defenses of the debtor and free from outstanding claims of ownership.

A written promise or order to pay money may be either negotiable or nonnegotiable in form. If it is nonnegotiable, it may only be transferred by assignment, not by negotiation. In an assignment, the person to whom the debt is transferred takes subject to all the defenses which the debtor had against the original creditor. In other words, the assignee gets no better right than his assignor had. For example, suppose that Smith bought an automobile from Brown, and gave his nonnegotiable note for \$500, payable to Brown. The car was to be delivered to Smith at a later date. Brown did not deliver the car, but indorsed and sold the note to an innocent purchaser, Green, for \$450. At maturity, Green sued Smith on the note, and Smith defended on the ground that, since the car was never delivered, he has a full defense to payment of the note. Smith is correct. Had Brown sued, Smith certainly would have this defense; and

since Green, Brown's assignee, gets no better title than Brown had, the defense is equally available in this suit by Green.

In order that notes and bills of exchange might be readily transferable, so as to supplement the use of money in the payment of debts, it was necessary to make an exception in their favor from the ordinary rules of assignment above referred to. It was therefore provided that, where the instrument was in proper form and negotiated to a purchaser in good faith, the maker could not set up any defenses he might have in a suit on the note. In other words, a purchaser in good faith of a negotiable instrument takes the instrument free from the defenses of the maker. Thus, in the above example, *had the note which Smith signed been negotiable in form*, and had Green purchased it in good faith and without knowledge of the fact that the automobile had never been delivered, Green could have recovered the full value of the note from Smith, in spite of the fact that Smith had never received consideration for it.

It will be noted that, in order to produce the above result, three major conditions must be present: (1) The instrument must be in form negotiable, i. e., it must comply with certain formal requisites on its face; (2) it must be transferred in a particular way, i. e., by negotiation, not by assignment; and (3) the transferee must comply with certain requisites, i. e., he must purchase (a) for value, (b) before the instrument is overdue, and (c) in good faith.

In the next chapter we shall consider these three conditions, knowing in advance what the result will be if they are present and what result if any one of them is absent.

CHAPTER 2

WHO IS A HOLDER IN DUE COURSE ?

Section

1. Negotiability in Form.
 2. Transfer—Who is a Holder?
 3. Holder for Value.
 4. Holder Before Maturity.
 5. Holder in Good Faith.
 6. Holder from a Holder in Due Course.
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SECTION 1.—THE INSTRUMENT MUST BE NEGOTIABLE IN FORM

1. IN GENERAL

An instrument, to be negotiable, must conform to the following requirements: (1) It must be in writing and signed by the maker or drawer; (2) must contain an unconditional promise or order to pay a sum certain in money; (3) must be payable on demand, or at a fixed or determinable future time; (4) must be payable to order or to bearer; and (5) where the instrument is addressed to a drawee, he must be named or otherwise indicated with reasonable certainty.¹

It is apparent that requisites of negotiability are fundamentally all based upon one; i. e., the necessity for certainty. The reason for this is not hard to seek; for a bill or note on which the terms of the obligation are indefinite, uncertain, or anything less than absolute, is clearly not suited to circulation as a substitute for money. The prospective purchaser will be disinclined, for example, to enter upon investigation into whether a condition to the maker's promise has or has not been fulfilled or whether the instrument will or will not become due upon a certain date dependent upon some event outside the four corners of the note.

¹ Uniform Negotiable Instruments
Law, § 1.

Negotiability is solely a matter of form; it is to be determined alone from what the instrument bears upon its face; and, if there it appears that a definite obligation is expressed, to pay a definite sum, at a time certain, the formal requirements for marketable paper are met.

2. THE INSTRUMENT MUST CONTAIN A PROMISE OR ORDER TO PAY

The instrument must contain a promise or order to pay, or its equivalent. So a receipt, or an I. O. U., or a written acknowledgment of a debt, could not be negotiable. "I authorize you to pay P, or order," could not be negotiable, since it merely confers a privilege of paying and debiting the drawer, but does not impose a duty to do so, as the law requires.

However, if the instrument contains words which imply a promise, it will be sufficient. "Due X \$100, payable upon return of this certificate properly indorsed," has been held negotiable; the promise to pay being implied from the word "payable."

ILLUSTRATIONS

1. "I owe James Baker \$100."

"I.O.U. E. A. Gay, the sum of \$17 for value received."

"Due Currier and Barker \$17.40."

Instruments bearing such language are mere acknowledgments that a debt exists, but contain neither expressly nor by implication a promise to pay.

2. "Due John Allen on demand, \$94.91," or "Due James Baker or order \$100," are notes; for the promise to pay is implied from the use of the additional words "on demand" or "or order."

3. "Please pay the bearer of these lines \$236 and charge the same to my account." This is a direction for the payment of the money absolutely and at all events. The insertion of the word "please" does not alter the character of the instrument as a bill of exchange. It is only a term of civility and does not imply that a favor is asked.

4. "Please to send ten dollars by bearer, as I am so ill I cannot wait on you." This was held not an order, but a mere request for the loan of money.

5. "To E. We hereby authorize you to pay on our account, to the order of P, \$6,000." This is not a bill, for it contains no order to pay, but a mere authorization that the drawee may pay and charge to drawer's account if he elects to do so.

3. THE PROMISE OR ORDER MUST BE UNCONDITIONAL

An instrument to be negotiable must contain an unconditional promise or order to pay a sum certain in money.²

An unqualified order or promise to pay is unconditional within the meaning of this act though coupled with: (1) An indication of a particular fund out of which reimbursement is to be made, or a particular account to be debited with the amount; or (2) a statement of the transaction which gives rise to the instrument. But an order or promise to pay out of a particular fund is not unconditional.³

Conditions may be express or implied. A condition is expressed:

- (a) Where "if," "on condition that," or words of similar import are attached to the promise or order;
- (b) Where the promise or order is to pay out of a particular fund.

A condition is implied: Where from a recital of the consideration on the face of the note it appears that a duty of the payee to perform precedes or is concurrent with the maker's duty to pay.

It is clear that a promise to pay if or on condition that a certain event happens does not create the absolute obligation necessary for a paper which is to circulate as a means of exchange. No person would wish to purchase paper, if the right to recover depended upon the happening of some event. Even though the event upon which the instrument is payable occurs, that will not remedy the defect, for negotiability depends solely upon the form in which the instrument is drawn and must be determined alone from an examination of the paper itself. Thus the obligation expressed must be absolute and not conditional. Where express words of condition are used, absence of negotiability is clear.

A promise or order to pay from or out of a particular fund is necessarily conditioned that there be in existence such a fund

² Uniform Negotiable Instruments ³ Id., § 3.

Law, § 1.

and that the content of the fund be large enough to pay the amount named. On the other hand, the instrument may merely contain a statement on its face that a certain account is to be debited or charged. This does not make the order dependent upon the existence of funds in such account, but merely indicates that such funds may be used. Wherever the order is to be paid at all events, whether the account named is sufficient or not, the instrument is unconditional. Thus the rule is generally expressed to the effect that the mere indication of a particular fund to be charged does not import a condition.

A recital upon the face of the instrument of the consideration for which it was given will not of itself condition the promise. Where the direction or promise to pay is declared to be given as "payment in full for painting," for example, or "for the amount of purchase price of an automobile," so far as appears from the recital the consideration is executed; i. e., the promisor has already received the goods.

On the other hand, where it appears from the face of the instrument that the recited consideration is still executory, there being an unperformed duty to act on the part of the payee, the courts usually hold that the maker's promise is impliedly conditioned on performance by the payee, so the instrument is non-negotiable; that is, the recital of the contract out of which the note arose shows that in that contract a non-performance by the payee would excuse the maker's performing his part of the agreement, which is to pay. Then the duty to pay is contingent, not absolute.

This is true, however, only where the duty of performance by the payee is to *precede or is concurrent with* the duty of the maker to pay as indicated by the maturity of the note. If the act, which the payee is to perform, is to come after maturity, then the maker's duty to pay is not dependent, but absolute. For example, on a three-month note the following recital appears: "It is agreed that payee is to deliver possession of the goods for which this note is given within ninety-five days of the date of this note." Here, although the recital shows an executory consideration, still the maker's promise is absolute, for in ninety days he is to pay at all events. But, had the recited agreement called for delivery of the goods to the maker at or before maturity of the note, then

the maker's promise would not be absolute, but dependent upon the payee's delivery, and the note would be nonnegotiable.

A question arises as to what words in the recital on the note show a duty on the part of the payee. If the recital is that "possession of the goods for which this note is given is to remain in the payee until payment," then most clearly the maker's promise is impliedly conditioned, for the payee must deliver possession before the duty to pay becomes absolute.

Where "ownership" is retained, here also a condition is implied; for ownership means title and right to possession. If, in exercise of his right, the payee should repossess the goods, he would be under a duty to redeliver them as a condition precedent to the maker's duty to pay.

Where "title" is retained merely, the courts hold the promise absolute. Here there is no duty on the payee's part, for title to personal property passes automatically according to the intention of the parties as expressed in their contract. In such case, then, payment of the note by the maker will perform the contract on both sides, since that is the only act necessary to pass the title. The objection that possible destruction of the property before maturity of the note would excuse the maker's duty to pay is met by the fact that the Sales Act places risk of loss upon the conditional vendee in possession.

Where the recital shows that the consideration for the note is real estate, and title is retained, the promise is impliedly conditioned, for title to real estate passes only upon delivery of a deed, so there is a duty to act on the part of the payee.

FLEMING v. SHERWOOD.

Supreme Court of North Dakota, 1912.
24 N.D. 144, 139 N.W. 101, 43 L.R.A.,N.S., 945.

Action by Joseph B. Fleming against George M. Sherwood. From a judgment for defendant, plaintiff appeals. Affirmed.

[Fetzer & Co. sold two drills to the defendant, Sherwood, receiving in payment a note signed by Sherwood as follows: "October 1st after date I promise to pay to Fetzer & Co. or order, fifty and no/100 dollars. Payee's ownership of goods account of

which this note is given, the account thereof and contract condition of original sale are not affected by accepting this note until receipt of full amount due thereon." This note was on June 9, 1908, sold to the plaintiff, who testified that at such time he had no knowledge of any defenses thereto. Defendant never received the drills and here pleads failure of consideration. If the note is negotiable, plaintiff is a holder in due course and the defense is cut off. If non-negotiable, the defense is good.]

BRUCE, J. * * * We are of the opinion that the note was not negotiable. * * *

The specific question which we are called upon to decide is whether the special clause in the instrument before us to the effect that "payee's ownership of goods account of which this note is given, the account thereof and contract condition of original sale are not affected by accepting this note until the receipt of the full amount due thereon," has the effect of neutralizing the otherwise positive agreement to pay and of destroying the negotiability of the instrument. The Uniform Negotiable Instruments Act (section 6303, R. C. 1905, et seq.) provides, among other things, that "an instrument to be negotiable * * * (2) must contain an unconditional promise or order to pay a certain sum in money," and "(3) must be payable on demand or at a fixed or determinable future time." This latter provision, however, is qualified by section 6305, which provides, among other things, that "an unqualified order or promise to pay is unconditional within the meaning of this chapter though coupled with * * * a statement of the transaction which gives rise to the instrument." The question, then, before us resolves itself into the question whether the promise to pay is unconditional.

There is a conflict in the authorities under the law merchant, and under the statutes which were based upon it, as to the effect of a reservation of title in the vendor of goods which is noted on the face of the instrument. Some of the cases make the distinction turn upon the fact of possession. Some hold that where the right of possession is in the vendee, and the seller has merely a naked title subject to the interest of the buyer, while the buyer has the right of possession and the contingent right to a title which would vest absolutely on the payment of the agreed price without further act on the part of the seller, the transaction is a

security transaction and not a conditional sale, and that the note is none the less negotiable. They hold, however, that where the possession is retained by the seller until the full payment of the purchase price, as well as the title, the note is not negotiable, since the agreement to pay is conditioned upon the fact of delivery, which is within the control of the vendor, and who, on the failure to pay at maturity, might cancel the agreement and retain the property. They, in short, hold that in such cases there is no positive agreement to pay, but rather that the transfer of title and possession and payment shall be simultaneous acts. * * *

It is to be noted that the reservation in the instrument is a reservation to the vendor of the "ownership" of the goods, and not merely the title. Section 4702, R. C. 1905, in defining the term, provides that: "The ownership of a thing is the right of one or more persons to possess and use it to the exclusion of others. In this Code the thing of which there may be ownership is called property." We thus find a note before us which reserves in the vendor the right to use and possess. The term, in fact, is broader than either the term "title" or "possession," and includes both. * * * We thus have in the case at bar a promissory note which reserves to the vendor the right to the possession of the goods, as well as the title, and which also is open to the charge of uncertainty in that it refers to the terms and conditions of a contract, the exact nature of which is undisclosed. Even under the most liberal rule, such a contract or note does not evidence an unconditional promise to pay, and, though the evidence discloses that there was a parole agreement that delivery of the goods should be made, the written note negatives this agreement, and the facts disclose that no such delivery was ever made.

We realize that section 6305 of the Negotiable Instruments Act provides that an unqualified order or promise to pay is unconditional within the meaning of the chapter though coupled with "a statement of the transaction which gives rise to the instrument." We have in this case, however, something more than the statement of the transaction. In fact, there is no statement of the transaction at all. We have a "reference" to a transaction and to a contract which may be entirely inconsistent with an unconditional promise to pay, and an express agreement of reservation

of ownership which in itself makes the agreement to pay conditional. * * *

FIRST BANK OF MARIANNA v. HAVANA CANNING CO.

Supreme Court of Florida, 1940. 142 Fla. 554, 195 So. 188.

Action upon bank check by the First Bank of Marianna, as endorsee, against the Havana Canning Company, as maker. Judgment for defendant below. Reversed.

PER CURIAM. * * * The sole question to be determined is whether the notation "For berries to be delvd us June 8th appearing in the lower left-hand corner of a bank "check" dated June 7th 1938, rendered the "check" conditional and non-negotiable.

The bank "check" involved here contained the following on its face:

"No. 278 Havana, Fla. June 7th, 1938.

"Havana State Bank

“68-170

"Pay to the order of George Wells \$125.00 One hundred twenty-five and no/100. Dollars.

For berries to be delvd us June 8th

Havana Canning Co.

E. J. Stephens, Pres."

* * * * A negotiable instrument is defined by our statute, Sec. 6761 (4675) C.G.L. F.S.A. § 674.02, as one which must conform to the following requirements:

- “1. It must be in writing and signed by the maker or drawer.
- “2. Must contain an unconditional promise on order to pay a

"2. Must be payable on demand or at such a day as will be sufficient time to pay a

3. Must be payable on demand, or at fixed or determinable future time.

4. Must be payable to order or to bearer; and,

5. Where the instrument is addressed to a drawee, he must be named or otherwise indicated therein with reasonable certainty."

This check is (1) in writing and signed by the maker; (2) contains an order to pay a sum certain in money; (3) is payable

on demand; (4) is payable to order; and (5) the Havana State Bank is definitely named as drawee therein.

There is only one point to consider, that is, whether the order to pay the sum certain was unconditional. So far as the check itself is concerned, eliminating from consideration the notation in the lower left-hand corner thereof, it is an unconditional order to pay a sum certain in money. Does the addition of the words in the lower left-hand corner, "For berries to be delvd us June 8th," add a condition to the otherwise unconditional order to pay a sum certain in money, and thus destroy its negotiability?

Sec. 6763 (4677) C.G.L., F.S.A. § 674.04, provides in part as follows:

"An unqualified order or promise to pay is unconditional within the meaning of this Chapter, though coupled with: * * *

"2. A statement of the transaction which gives rise to the instrument."

That brings us to the inquiry as to what constitutes a statement of the transaction giving rise to the instrument.

It has been held that a statement in a trade acceptance that the obligation of the acceptor arises out of the purchase of goods from the drawer does not, under this section, deprive the instrument of its negotiability. * * * A note containing a statement of the transaction out of which it arose and an agreement to return the goods purchased on default is negotiable. *Remedial Plan v. Ott*, 199 Ky. 161, 250 S.W. 825. A notation on a trade acceptance "in settlement of the purchase of goods as billed in our invoice, No. _____, dated _____," does not destroy its negotiability. *Levy v. Artophone Co.*, Mo.App., 249 S.W. 158, 159.
* * *

It has been held that the following notations on otherwise negotiable instruments do not render them non-negotiable; a recital below the maker's signature that the note is "given to secure" a certain sum, *Morehead v. Cummins*, 207 Mo.App. 64, 230 S.W. 656; the words "for unfinished work on bldg." appearing on face of note, *Cincinnati Brush & Mop Mfg. Co. v. Weber*, 35 Ohio App. 506, 172 N.E. 568; a check with the clause "to be used in part renewal of note", due on certain date, *R. S. Howard Co. v. International Bank*, 198 Mo.App. 284, 200 S.W. 91; a note containing the clause "This note is given covering deferred in-

stallments under conditional sale contract for a motor vehicle." Continental Guaranty Corp. v. People's Bus Line, Inc., 1 W. W. Harr. 595, 31 Del. 595, 117 A. 275, 276; a note stating it is given for the purchase of a stallion which the seller warrants, Critcher v. Ballard, 180 N.C. 111, 104 S.E. 134, see, also, Welch v. Owenby, 73 Okl. 212, 175 P. 746; a note that provides, "This note is given in accordance with a land contract of even date herewith between E. H. Bauch and J. P. Considine", Doyle v. Considine, 195 Ill.App. 311; and a note containing a statement that it is given to take up the freight and rehandling of a certain car and that the proceeds from resale of such car shall apply on the note. First National Bank of Snohomish v. Sullivan, 66 Wash. 375, 119 P. 820, Ann.Cas.1913C, 930.

Words employed on the face of a bank check merely to designate the transaction for which the check is given do not impair the negotiability of an otherwise negotiable instrument, under the provisions of Sec. 6763 (4677) C.G.L., F.S.A. § 674.04. The use of such words on checks is not unusual among business houses or even by private individuals, in the payment of accounts and for services. It is not their intention in making such notation on any check to deny it negotiability but to make it simpler for them when accounting for funds spent to identify a particular check as payment for a particular item. To hold otherwise would destroy the negotiability of a great body of instruments that are commonly negotiable under our present mercantile customs. The fact that such bank check is payment for goods or services that are not furnished at the time the check is issued does not affect the negotiability of the check, provided the notation merely states what the transaction is, giving rise to issuance of the check.

* * *

The words employed on the face of the bank check in the instant case, "For berries to be delvd us June 8th", is merely a statement of the transaction giving rise to issuance of the check, and in no way places a limitation upon or impedes its negotiability.⁴ * * *

⁴ Suppose the same notation had appeared on a note due six months after date, instead of a check which is an order drawn on a bank payable immediately. Would the court

have been able to say with equal facility that it was a "mere statement of the transaction which gave rise to the instrument"?

MANKER v. AMERICAN SAV. BANK & TRUST CO.

Supreme Court of Washington, 1924.
131 Wash. 430, 230 P. 406, 42 A.L.R. 1021.

MACKINTOSH, J. In April, 1923, the appellant was the owner of two local improvement bonds issued by the city of Seattle, payable out of funds to be raised by a special assessment in local improvement district No. 3032. These bonds were in that month stolen from the appellant's safety deposit box in a bank at Vashon, Wash., and thereafter came into the possession of the respondent bank, which purchased the same in the due course of business. The respondent city of Seattle has the funds on hand to pay these two bonds and has called for their payment, and this litigation concerns only the question whether the appellant or the respondent bank is entitled to such payment. The ultimate question is whether these bonds are negotiable instruments.

The bonds provide that the holders shall have no claim against the city, "except from the special assessment made for the improvement for which such bond was issued." Another provision is that:

"The city of Seattle * * * hereby promises to pay * * * or bearer * * * out of the fund established by ordinance No. 36562 of said city, and known as local improvement fund district No. 3032, and not otherwise."

And, further, that:

"The holders or owners of this bond shall look only to said fund for the payment of either the principal or interest on this bond."

The Negotiable Instruments Act provides, in section 3392 (Rem. Comp. Stat.) that:

"An instrument to be negotiable must conform to the following requirements * * * (2) must contain an unconditional promise or order to pay a sum certain in money."

Section 3394 provides that:

"An unqualified order or promise to pay is unconditional within the meaning of this act, though coupled with—

"1. An indication of a particular fund out of which reimbursement is to be made * * * but an order or promise to pay only out of a particular fund is not unconditional."

It would seem that, under the plain provisions of the Negotiable Instruments Act, these bonds, by their terms, do not contain an unconditional promise to pay, for they explicitly state that the payment is to be made only out of a particular fund.

The Negotiable Instruments Act, as has been often stated, is but a re-enactment of the law merchant, with certain modifications. Under the law merchant, a promise to pay out of a particular fund is not an unconditional promise to pay, and an instrument thereunder was therefore nonnegotiable. * * * * Although the bonds in controversy here meet all the other requirements of negotiability set out in section 3392, Rem. Comp. Stat., the fact that they contain no unconditional promise to pay makes them nonnegotiable instruments, and the appellant from whom they were stolen would be entitled to the bonds as against the respondent bank, which came into possession of them through a chain of transfers from the thief. * * *

The judgment is therefore reversed, and the appellant will be entitled to the amount held by the city of Seattle for the extinction of his bonds.

ILLUSTRATIONS

1. "I promise to pay to the order of James Parker \$1,000 from the money due me from the Hinkley estate. John Miller." This is not a negotiable instrument, for the promise is conditioned upon the existence and content of a fund due Miller from the named estate.

2. "To the Darcy Bank. Pay John Robinson or order on September 1st \$500, upon receipt by me of automobile. Jim Brown." This order is expressly conditioned upon delivery of the automobile.

3. "G. W. Lightner. Pay to the order of F. Donnell \$1,500 on account of contract and charge to my shop account. Sam McClure." This instrument is a negotiable bill. The words "on account of contract" are a mere reference to the transaction out of which the bill arose; and the direction to charge to the particular account, since it does not limit the payment to the account named, does not condition the order.

4. "I promise to pay P or order \$500 on demand. This note is given for an automobile. James Green." This is a negotiable

note. The mere statement of the consideration for which the note was given does not condition the promise.

5. "Jan. 1, 1934. I promise to pay to order of J. Parker \$500 five months from date. This note is given for advertising to be furnished for a period of three months beginning February 1st, 1934. James Green." The note is nonnegotiable, as the promise is impliedly conditioned upon the advertising being furnished. At maturity of the note, if the payee failed to furnish the advertising, the maker would have the defense of failure of consideration. The recital shows that the maker by implication conditioned his promise.

6. Same note as above, except that the recital states the advertising is to be furnished "for three months beginning June 1, 1934." Here, although the recital shows the maker has not received the consideration for the note, still the promise is absolute and the note negotiable, for the maker has agreed to pay at all events on June 1st, before any advertising was to be furnished.

7. "I promise to pay to order of James Parker \$1,000 Jan. 1, 1934. This note is given for an automobile, title and possession of which is retained in the payee until the note is paid. John Miller." The promise is impliedly conditioned upon delivery of possession of the automobile to the maker, so the promise is not absolute, and the note is nonnegotiable.

4. THE TIME OF PAYMENT MUST BE CERTAIN

Maturity is fixed in one of four ways, i. e. the instrument may be made payable (1) on demand; (2) on the happening of an event; (3) on a specified date; or (4) on a specified date subject to an acceleration clause. Demand paper meets the requisite of certainty of time. An instrument payable on the happening of an event is uncertain, except where the event named is one certain to happen. An instrument payable on a specified date is of course certain. An instrument payable on a day certain, but subject to acceleration, is negotiable or not, according to where the option to accelerate lies. If the acceleration is within the maker's option, negotiability is not affected by the acceleration clause. If within the holder's option, there is a conflict of authority. If acceleration is automatic, neither maker nor holder having control of the event which is to accelerate,

the time of payment is held uncertain and the instrument is non-negotiable.

In order that commercial paper be readily marketable, the time of payment must be certain. The holder must know the date when he may demand payment; the maker must know when he will be required to pay.

(a) Demand Paper

Time of payment on demand paper is certain, for the instrument is due when it is issued. Suit may be started the moment the instrument passes out of the hands of the maker, and without any actual demand being made. The suit itself is considered sufficient demand.

The Negotiable Instruments Law defines demand paper as follows: "An instrument is payable on demand: first, when it is expressed to be payable on demand, or at sight, or on presentation; or, second, in which no time of payment is expressed. Where an instrument is issued, accepted, or indorsed when overdue, it is, as regards the person so issuing, accepting, or indorsing it, payable on demand.

(b) Maturity Dependent on an Event

Where the instrument is payable upon the happening of some event, the time of payment is uncertain and the instrument is thereby rendered nonnegotiable, unless the event is one certain to happen at some time. So a promise to pay "when the Mauretania next docks in New York" is uncertain, for the ship may never come in. And a promise to pay "when B reaches the age of twenty-one" is nonnegotiable, both because the time of payment is uncertain, since B may die before he becomes twenty-one, and because a condition is imposed on the promise.

If the event upon which the instrument is to become payable is one certain to happen, the instrument is payable at a time certain and is negotiable, even though the time of happening be uncertain. This rule of the law merchant was codified in the Negotiable Instruments Law in section 2. It does violence to the reason for the requirement of certainty, since the holder cannot tell when the instrument will mature; but it was so well established in the

decisions that it was thought well to incorporate it into the provisions of the Negotiable Instruments Law.

(c) *Maturity on a Specified Date, but Subject to Acceleration*

An instrument may be made payable on a certain date, but to become due before that date if some named event should occur. The happening of the event would accelerate maturity, so this is called an "acceleration clause." The event may be one in the control of the maker, or it may be one in the control of the holder, or it may be one not in the control of either party.

If the event is within the control of the maker, negotiability is not affected. Negotiable Instruments Law, § 4, expressly states that an instrument payable "on or before a specified date" is payable at a time certain. A promise to pay "on or before 60 days from date" is a promise maturing in sixty days but subject to acceleration in the option of the maker. Thus, since acceleration in the absolute option of the maker does not make the time uncertain, one in the maker's limited option would clearly be certain, since the greater includes the lesser. So a note which permits the maker to pay at an earlier date than the one stated, provided a certain event occurs, would confer a limited option on the maker to accelerate. For example, a promise to pay "in two years * * * but maker may pay before that date if dividend is declared," would be negotiable.

If the acceleration is at the holder's absolute option, the courts generally hold the time uncertain and the instrument nonnegotiable. So an instrument "due 12 months from date, or at any time before if the holder deems himself insecure," is nonnegotiable. Why this should be so is difficult to explain, for such clauses would seem to add to, rather than subtract from, the salability of the paper.

If the acceleration is at the holder's limited option, he being able to hasten maturity only if some event happens, negotiability depends upon whether maker or holder controls the happening of the event. If this lies within control of the holder, there is deemed uncertainty as to time, in line with the result where the holder's option to accelerate is absolute. If control of the event which is to give the holder power to accelerate maturity is with the maker, however, negotiability is not affected, for here

it requires the combined assent of both parties to accelerate. So a promise to pay "in three years from date, but upon default in any interest payment the principal sum to come due at the option of the holder," would be negotiable, since the maker can prevent the note from coming due before its maturity date by meeting the interest payments.

If acceleration is made dependent on an event not in the control of either maker or holder, and the happening of the event is to mature the instrument automatically in advance of its stated maturity, the time is uncertain and the instrument nonnegotiable.

LEADER v. PLANTE.

Supreme Judicial Court of Maine, 1901.
95 Me. 339, 50 A. 54, 85 Am.St.Rep. 415.

FOGLER, J. This is an action of assumpsit by the indorsee against the maker of a written instrument, declared upon as a promissory note, of the following tenor, namely:

"\$406. Auburn, Maine, August 30th, 1892.
"Within one year after date I promise to pay to the order of Richard F. Leader four hundred and six dollars at with interest.
Value received. Telesphore Plante."

Witness: "P. H. Kelleher."

Indorsed: "Richard F. Leader."

The writing was indorsed and delivered by the payee to the plaintiff January 2, 1893.

It is claimed in defense that the instrument is not a valid negotiable promissory note, for the reason that the time of payment named therein is not stated with sufficient certainty. In other words, it is contended that "within twelve months" is too uncertain and indefinite as to time of payment to give the instrument the character of a negotiable promissory note. It is familiar law that, to constitute a negotiable promissory note, the time of payment must be stated with certainty. It is also a familiar maxim that that is certain which can be made certain.

"A valid promissory note is not necessarily negotiable. To make it such by the law merchant it must run to order or bearer,

be payable in money for a certain definite sum, on demand, at sight, or in a certain time, or upon the happening of an event which must occur, and payable absolutely, and not upon a contingency. *Roads v. Webb*, 91 Me. 406, 40 A. 128, 64 Am.St.Rep. 246.

It is well settled that a note payable at the death of the maker is a valid negotiable promissory note, as death will inevitably occur, and the time of payment can thus be made certain. *Martin v. Stone*, 67 N.H. 367, 29 A. 845.

"Within" a certain period, "on or before" a day named, and "at or before" a certain day, are equivalent terms, and the rules of construction apply to each alike. As stated by Mr. Justice Strout in *Roads v. Webb*, *supra*, the question whether a note made payable "on or before" a day certain states the time of payment with sufficient certainty to constitute a negotiable note has not been decided in this state. * * *

Mattison v. Marks, *supra*, [31 Mich. 423, 18 Am.Rep. 197], was a suit upon a written instrument containing a promise to pay a sum certain "on or before" a day named. It was contended in defense that it was not a promise to pay on a day certain, and consequently was not a negotiable promissory note. The court held that the instrument was a negotiable promissory note. Mr. Justice Cooley, in delivering the opinion of the court, says: "The legal rights of the holder are clear and certain. The note is due at a time fixed, and it is not due before. True, the maker may pay sooner, if he shall choose; but this option, if exercised, would be a payment in advance of the legal liability to pay, and no more. Notes like this are common in commercial transactions and we are not aware that their negotiable quality is ever questioned in business dealings." * * *

Our conclusion is that the instrument here in suit is a valid, negotiable, promissory note. * * *

Judgment for plaintiff.

UTAH STATE NAT. BANK v. SMITH et al.

Supreme Court of California, 1919. 180 Cal. 1, 179 P. 160.

WILBUR, J. Appellants, claiming to be bona fide purchasers for value of a negotiable promissory note, brought this action against

the makers thereof to enforce its payment. The defendants, asserting that the note was nonnegotiable, interposed a defense valid against the payee therein. The court instructed the jury that the note was nonnegotiable, and that the defense, if established, would defeat recovery on the note. A verdict was rendered favorable to the defendants, and judgment thereon entered. This is an appeal from the judgment. * * * The provision relied upon to establish nonnegotiability is the usual provision for accelerating the due date for default in the payment of interest, as follows:

"If the interest is not paid when due, then both principal and interest shall become due at the option of the holder of this note." * * *

All the decisions based upon the uniform negotiable instrument law, so far as we are advised, hold that the clause in question does not destroy the negotiability of a promissory note.

* * * By that statute a note is negotiable if payable at a "determinable future time." * * * An instrument payable at a fixed period after sight is payable at a "determinable future time," the exact date of payment being ascertainable at the date of presentation, but not before. A note payable "on or before a fixed date" is payable at a "determinable future time." If the instrument expressly states that it is payable "on or before" a fixed date, it is payable at the date in question or, at the option of the payor, at any earlier date selected by him for payment. The exact due date is thus left to be determined at a future date by the option of the payor, if exercised before the fixed due date. Under the law merchant the option in such a case lies altogether with the payor, but the due date is no less "determinable" when the option lies with the payee instead of the payor, and if the option of the payee is limited to the case of a default in the payment of an installment of interest the date of maturity is not less determinable in the future, for it may be fixed by the payee at any reasonable time after such default. * * * It declares that an instrument which is in fact payable on or before a certain date is negotiable. For the reasons stated the note in question is payable at a determinable future time, to wit, at a fixed date or before that date at the payee's option in case of a default in the payment of interest. There seems no reason for supposing that in this attempt to

secure uniform legislation and decision it was intended to change a well-settled rule of the law merchant, by which in nearly every state such a note was negotiable. Construed in the light of such rule, and under the plain language of the statute, the note is clearly negotiable. * * *

HOLLIDAY STATE BANK v. HOFFMAN.

Supreme Court of Kansas, 1911.
85 Kan. 71, 116 P. 239, 35 L.R.A., N.S., 390, Ann.Cas.1912D, 1.

Action by the Holliday State Bank against C. B. Hoffman. Judgment for plaintiff, and defendant appeals.

PORTER, J. The bank brought this action on a promissory note given by C. B. Hoffman to the Merchants' Refrigerating Company for shares of its capital stock. Hoffman admitted the execution of the note and alleged a total failure of consideration. On the trial he introduced evidence tending to show that the stock for which the note was given was valueless, and that he was induced to purchase the same by the false and fraudulent representations of J. E. Brady, president of and acting for the refrigerating company. The plaintiff introduced evidence tending to show that it purchased the note in due course, without notice of defenses. At the close of the evidence, the court directed a verdict for the plaintiff for the amount of the note, with interest. The defendant appeals.

The case turns upon the question whether the note is negotiable. It reads as follows:

"\$4,500. No. ——, Kansas City, Mo., Sept. 18th, 190—. Due —— Six months after date for value received I promise to pay to the order of Merchants' Refrigerating Company, Kansas City, Missouri, forty five hundred and no/100 dollars at the office of the Merchants' Refrigerating Company, Kansas City, Mo., with interest from maturity until paid at the rate of six per cent. per annum. To secure the payment of this note and of any and all other indebtedness which I now owe to the holder hereof, or may owe him at any time before the payment of this note I have hereto attached, as collateral security the following: Stock certificate No. 137 of the capital stock of the Merchants' Refrigerating Com-

pany, calling for 50 shares of the stock; par value \$5,000. The above collateral has a market value of \$6,250.00. If, in the judgment of the holder of this note, said collateral depreciates in value, the undersigned agrees to deliver when demanded additional security to the satisfaction of the holder; otherwise this note shall mature at once. * * * C. B. Hoffman."

[The defendant contends the note is nonnegotiable for the reason that the acceleration provision within the option of the holder renders the time of payment uncertain.] * * *

The note is nonnegotiable for the further reason that the same provision renders doubtful and uncertain the time at which it shall become due. If the maker shall fail when demanded to furnish additional security to the satisfaction of the holder, the note shall mature at once. It is argued that this is no different in principle from the provision that default in the payment of any installment shall accelerate the maturity of the note, and cases are cited in which we have held that a similar provision will not render the note nonnegotiable. * * *

* * * The negotiable instruments law itself expressly declares that a negotiable instrument may contain provisions of this kind. * * * The distinction between such a stipulation and the one in question lies in the fact that in the one instance the maturity is accelerated by the default of the maker alone, and the default is to consist in his failure to pay money. Here the maturity of the note is to be accelerated by the failure of the maker to do something in addition to the payment of money, and both contingencies are made to depend upon something over which he has not the absolute control. It is within the power of the holder, by refusing assent to what the maker has done, arbitrarily to make the note due at any time between the date of its execution and six months thereafter. If the holder is not satisfied with the additional security, the note matures at once, and thus the time at which it may mature would depend upon the time at which the holder declared himself dissatisfied with the security delivered by the maker. The effect of this stipulation is to leave the time when payable uncertain and indefinite. * * *

The trial court erred in holding the instrument negotiable and in directing a verdict. The judgment will therefore be reversed. * * *

PUGET SOUND STATE BANK v. WASHINGTON
PAVING CO.

Supreme Court of Washington, 1917. 94 Wash. 504, 162 P. 870.

Action by the Puget Sound State Bank against the Washington Paving Company and others. From judgment for defendants, plaintiff appeals. Judgment affirmed.

PARKER, J. The Puget Sound State Bank seeks recovery upon two promissory notes executed by the defendant, Washington Paving Company, payable to its own order, thereafter transferred by it to the Olympia Bank & Trust Company by indorsements making them payable to its order and thereafter transferred by that bank by delivery only, without endorsement, to the plaintiff. George Milton Savage and D. I. Cornell were made defendants because they indorsed the notes at the time they were transferred by the Washington Paving Company to the Olympia Bank & Trust Company. Trial in the superior court without a jury resulted in findings and judgment in favor of the defendants upon the ground that, while the notes evidenced legal obligations of the defendants, they were entitled to set-off against the amount due thereon to the plaintiff a greater amount which was owing to the Washington Paving Company from the Olympia Bank & Trust Company upon a deposit credit at the time of the transfer of the notes by that bank to the plaintiff. From this disposition of the case the plaintiff has appealed to this court. * * *

Our problem then is, Is the Puget Sound Bank wholly in the shoes of the Olympia Bank? If this question be answered in the affirmative, manifestly the Puget Sound Bank cannot recover in this action because the amount due it upon these notes is less than the amount of the deposit credit of the paving company in the Olympia Bank. * * *

Are the notes negotiable in the sense that their transfer to the Puget Sound Bank destroyed the defense of set-off invoked by the paving company? We have seen that each of the notes contains this provision:

"This note shall become due and payable on demand at the option of the payee when it deems itself insecure."

* * * * *

These provisions, we think, answer this question according to the contention of counsel for respondent. We think the word "contingency" are here used refers to contingency as to time, though it may also refer to other contingencies. Let us, however, look to the law as found in the decisions of the courts, of which, after all, these statutory provisions are only declaratory. We note here that the above-quoted provision in these notes gives the Olympia Bank, the payee, the unrestricted power to declare the notes due at any time before maturity, and that the right to exercise such power possessed by the payee is not dependent upon nor does it grow out of any act, promise, or agreement of the paving company, the maker of the notes. In other words, it is a contingency over which the maker of the notes has no control.

In *Brooks v. Hargreaves*, 21 Mich. 254, there was under consideration the question of the negotiability of a note which, while providing for payment one year after date, contained also the following:

"To be paid when any dividends shall be declared on such shares as Joseph Smith has been holding heretofore in the Agricultural & Broom Handle Manufacturing Company."

Chief Justice Campbell, speaking for the court, while recognizing that the note would in any event, become payable at the end of the year, held that the contingency specified in the above-quoted portion of the note was so uncertain as to time of payment as to render the note nonnegotiable. * * *

[Under all of the authorities] the right of the payee of the note to declare the same due before maturity upon him deeming himself insecure was the controlling fact rendering the notes nonnegotiable. In other words, the question of the time of payment of the note in each of those cases was dependent absolutely upon the will and election of the payee of the note. * * *

We feel constrained to hold that these notes are not negotiable, and are therefore subject to any defense the paving company may have against them, which existed at the time of their transfer to the Puget Sound Bank. * * *

Judgment affirmed.

ILLUSTRATIONS

1. M executed a note as follows: "I promise to pay to the order of P \$1,000. M." The note was delivered to P for a consideration, which subsequently failed; that is, suppose it to be delivered in payment for an automobile, and suppose that M never received the automobile. Two days after issue of the note, P sold it to A, who gave value and took in good faith and without knowledge that M had never received the consideration. A sued M, who seeks to defend on the ground that he never received anything for the note. M's defense should be stricken out, and A could recover. The note is negotiable, for, where no time of payment is expressed, the instrument is deemed payable on demand.

2. Same facts as above save that the promise is to pay P "when this year's crop is harvested." A could not recover, as M could interpose his defense of failure of consideration. If A were the holder in due course of a negotiable instrument, he could recover; but the instrument is not negotiable, since the time of payment is uncertain. This is not an event certain to happen, for the crop may never be harvested.

3. Same facts, save that the promise is to pay P "ten days after the death of B." Here the time of payment is certain, and the instrument negotiable. The death of B is an event certain to happen, even though the time of happening be uncertain, and this is permissible within the express terms of the Negotiable Instruments Law.

4. A note as follows: "Twelve months from date (or before if made out of the sale of Drake's hay fork) I promise to pay John Drake or bearer \$100. D. M. Reed," is payable at a determinable time and is negotiable. There is only one date of maturity. The acceleration merely gives the maker an option to discharge his obligation *in advance of maturity*.

5. A note payable a year from date stated: "Upon the maker hereof suspending payment, giving a chattel mortgage, or failing to meet at maturity any prior obligation, this note, at the option of the holder, shall immediately become due and payable." A negotiable instrument. Acceleration is within control of the

maker, since the event upon which the holder's right to accelerate depends can be prevented by the maker.

6. A note contained the following clause: "Due in three years from date, but if the General Motors stock deposited herewith as security should depreciate ten points, this note shall immediately become due and payable without notice or demand to the maker hereof." This note would be nonnegotiable, since not payable at a time certain. The event is one not in the control of either maker or holder, and its happening is automatically to mature the note in advance of its stated due date.

5. THE SUM TO BE PAID MUST BE CERTAIN

If the principal sum is certain, negotiability is not affected by the fact that it is to be paid with interest, or by installments, or with exchange either at a fixed or at the current rate, or with costs of collection and attorney's fees.

To meet the requisite certainty of obligation necessary for credit paper to pass from hand to hand as substitute for money, it is clear that the sum to be paid must be definite. Where it cannot be determined from the face of the instrument what amount is to be paid, the bill or note is nonnegotiable. Thus a promise to pay P or order \$143.25, with "such additional premium as may be required on policy number 50," would not be negotiable; nor would an order on D to pay P "whatever sum is now due and owing from J. Bates to Roy Webster"; nor would an order to pay "either 225 pounds sterling or \$1000 if paid in New York."

On the other hand, absolute certainty of sum in all details is not required so long as the principal sum is certain. Thus a note providing that maker shall pay, in addition to the principal sum, costs of collection and attorneys' fees in the event of default, is not thereby rendered non-negotiable, because the sum due at maturity is certain, and this is a collateral obligation separate and apart from the primary promise to pay money. If no amount of attorneys' fees is stated, this does not affect negotiability, for it is held that a reasonable fee was intended. If the amount of interest is left blank, the legal rate is then payable. A different

rate of interest before and after maturity does not make the amount to be paid uncertain. So a "promise to pay \$1,000 in two years with interest of 5%, but if not paid at maturity, interest to be at the rate of 7% for the total period," is not rendered non-negotiable by reason of uncertainty of amount, either because (1) the amount due at maturity is certain, and that is all that is required, or (2) the increase in interest rate is void as a penalty, and therefore may be disregarded.

MECHANICS' BANK of NEW HAVEN v.
JOHNSON.

Supreme Court of Error of Connecticut, 1926. 104 Conn. 696, 134 A. 231.

HINMAN, J. The mortgage sought to be foreclosed is upon three pieces of land in Wallingford, and is dated January 11, 1924. It was given by the defendant Johnson to secure a note of the same date for \$5,000, payable to the order of James H. Clark, "with interest at the rate of 7 per cent. per annum, payable annually, together with all taxes assessed upon said sum against the payee or the holder of this note." Clark also held another note for \$3,000 given by Johnson, secured by mortgage on land in Hamden. On that date the plaintiff loaned \$8,000 to Clark and one Snyder, and Clark indorsed the Johnson \$5,000 note in blank, delivered it and the mortgage to the plaintiff, together with the \$3,000 note and mortgage, as collateral security for the loan, and assigned the note and mortgage to the plaintiff. * * *

The first open question is as to whether or not the mortgage note is negotiable. Section 4359 of the General Statutes provides, among other essentials, that an instrument, to be negotiable, "must contain an unconditional promise or order to pay a sum certain in money." This requirement is not met if the promise be to pay a certain sum, plus another indefinite sum, except in the instances specified in section 4360. The provision for the payment of taxes assessed upon the principal of the note is not included within these instances, and renders the sum payable uncertain and the note nonnegotiable. The taxes are not due or ascertained at the time of the execution of the note, and those which may be assessed in the future depend upon undetermined

and varying rates of taxation, so that the amount to be paid by the maker will fluctuate according to collateral circumstances dependent upon the domicile of the holder. * * *

The note here in question being nonnegotiable, the plaintiff, when it took the assignment of January 11, 1924, did so subject to defenses, if any, existing in favor of Johnson against Clark at the date of the transfer. * * *

[Reversed and remanded.]

6. WORDS OF NEGOTIABILITY

The instrument to be negotiable must contain words of negotiability. "To order" or "to bearer" or their equivalent are such words.

Where the maker of a note or bill expresses his obligation to pay either to the payee named or to whomever he designates, he evidences his intention to make a negotiable instrument. Similarly, where payment is expressed to be to bearer or to a named payee or bearer. These are words of negotiability, and a failure to include them results in a nonnegotiable instrument.

However, the exact words, order or bearer, need not be used. Any word of similar import will meet the requirement. So a certificate of deposit that read, "Received from J. Brown for deposit \$3,000, payable on return of this certificate properly indorsed," was held negotiable, on the ground that the words "properly indorsed" had the same effect as "to order," since that was the necessary implication.

SOLDIER VALLEY SAV. BANK v. CAMANCHE SAND & GRAVEL CO.

Supreme Court of Iowa, 1935. 219 Iowa 614, 258 N.W. 879.

This action is brought by the Soldier Valley Savings Bank against Camanche Sand & Gravel Company and Lynch Construction Company, both of Davenport, Iowa, upon a certain instrument for \$3,715.07. The lower court held that the instrument was nonnegotiable, and allowed, as an offset thereto,

a claim of \$3,621.91, which the Camanche Sand & Gravel Company had against the payee, and entered judgment accordingly.

Affirmed.

KINTZINGER, J. On November 17, 1932, the following instrument was delivered to the Lynch Construction Company by the Camanche Sand & Gravel Company:

"To Bills as follows:	Camanche Sand & Gravel Co., Voucher No. 2410
Invoice	Check No. 1896 Davenport, Iowa, Nov. 17, 1932.
Note: Do not change this Voucher. In case of error return at once. Indorsement on back is the only receipt required. Deposit in any Bank for collection as check.	This Voucher when properly indorsed by payee becomes a check on
	Union Savings Bank and Trust Company of Davenport, Iowa.
	To Lynch Construction Company, For _____
	Three Thousand Seven Hundred Fifteen and 07/100 Dollars, \$3,715.07
	[Signed] Geo. E. Kuhn Asst. Treasurer."

It contained the following indorsement on the back: "Deposit to Soldier Valley Savings Bank, Soldier, Iowa, accepted as payment in full for bills noted on face of this check. [Signed.] Lynch Construction Co., By T. F. Harrington, Jr."

This instrument, after being so indorsed, was, by the Lynch Construction Company, sent direct to the Continental Illinois National Bank & Trust Company of Chicago, a correspondent bank of the Soldier Valley Savings Bank, and was by the Chicago bank deposited to the credit of the Soldier Valley Savings Bank, Soldier, Iowa. After being notified of such credit, the Soldier Valley Savings Bank credited the account of Lynch Construction Company with the amount of the instrument, and thereafter paid checks of the Lynch Construction Company for the full amount of said deposit. Payment of the instrument was stopped by the Camanche Sand & Gravel Company, and payment was refused by the Union Savings Bank & Trust Company when presented. The instrument was then returned to the Soldier Valley Savings Bank, who brought this action.

The undisputed evidence shows that the defendant Camanche Sand & Gravel Company would have had a valid defense against the instrument in question, if sued on by the payee to the extent of \$3,621.91. It is also conceded that if the instrument in ques-

tion is not a negotiable instrument, the same defense could be interposed against the present holder of the instrument.

If it is negotiable, the defense alleged should be precluded; if it is nonnegotiable, the defense against the Lynch Construction Company is available against appellant. The lower court held the instrument to be nonnegotiable, and entered judgment allowing the offset. Plaintiff filed a motion for a new trial which was overruled; hence this appeal.

I. The principal question presented is whether or not the paper sued on is a negotiable instrument. Section 9461 of the Code of 1931 (Negotiable Instruments Act) provides:

"An instrument to be negotiable must conform to the following requirements: * * *

"4. Must be payable to the *order* of a specified person or to *bearer*." (Italics ours.)

Section 9468 of the Code provides that:

"The instrument is payable to *order* where it is drawn payable to the *order of a specified person or to him or his order*. * * *

(Italics ours.)

"Where the instrument is payable to order, the payee must be named or otherwise indicated therein with reasonable certainty."

Section 9469 of the Code provides that: "The instrument is payable to bearer:

"1. When it is expressed to be so payable; or

"2. When it is payable to a person named therein or bearer."

It is clearly not payable "to bearer."

It is contended that because the instrument contains the words, "this Voucher when properly endorsed by payee becomes a check on Union Savings Bank and Trust Company," it became a check after the following indorsement was made thereon by the payee: "Deposit to Soldier Valley Savings Bank, Soldier, Iowa. Indorsed and accepted as payment in full for bills noted on face of this check. [Signed.] Lynch Construction Co., by T. F. Harrington, Jr." It is now claimed that the instrument was thereby properly indorsed; that by such indorsement it became a check and constituted a negotiable instrument.

The most that can be claimed for the instrument, if properly indorsed, would be that it then became a check. If it then became a check, it was still payable specifically to only the Lynch Construction Company, and not to its *order*. An instrument does not become negotiable by simply calling it a check unless the words of negotiability required by the act for negotiable instruments appear thereon. * * * It is not payable to bearer, and is not payable to the order of the Lynch Construction Company, or to Lynch Construction Company or order. It is simply payable to the Lynch Construction Company, and is not "payable to the order of a specified person or to bearer." It is, therefore, obvious that it does not meet the clear requirements [of negotiability, and the drawer's offset against the payee was properly admitted against the plaintiff.] * * *

Affirmed.

SECTION 2.—TRANSFER—WHO IS A HOLDER?

1. NEGOTIATION IN GENERAL

Negotiation is transfer in such manner as to constitute the transferee a holder. To be a holder in due course, one must first be a holder.

Bearer paper is negotiated by delivery alone. Order paper is transferred by indorsement completed by delivery. The holder of bearer paper, then, is the person in possession. The holder of order paper is the payee or indorsee in possession.

Transfer of an order instrument by delivery alone operates merely as an assignment. The rights of the transferee cannot rise higher than those of the transferor. Consequently all defenses available against the transferor are available against the transferee. Such transferee is not a holder, so not a holder in due course. Therefore he cannot come under the rule that the holder in due course of a negotiable instrument takes free from defenses.

Thus, if M draws his negotiable note to P's *order*, induced to do so by P's fraud, and if P transfers the note for value and be-

fore maturity to A by mere delivery, M's defense of fraud is as available against A as it would be against P; A cannot be a holder in due course so as to cut off M's defense, even though A is an innocent purchaser for value. He is not a holder, since he took by transfer and not by negotiation.

On the other hand, where the transfer is by negotiation, then the transferee becomes a holder, and so may be a holder in due course, provided the other requisites, of negotiable form, value, before maturity and good faith, are present. In such a situation, the rights of the transferee do rise higher than those of his transferor, in that defenses are cut off. So in the above example, had P *indorsed* the instrument before delivery to the purchaser, A, the note would have been a valid contract in A's hands free from M's defense of fraud. A would have become a holder, since he would have been an "indorsee in possession" under the definition of a holder of order paper.

As to instruments payable to bearer, negotiation occurs with mere transfer of possession alone. No indorsement is necessary. The Negotiable Instruments Law defines a holder of bearer paper simply as "the person in possession." So in the above example, had the instrument been payable "to P or bearer," A would be a holder by P's mere delivery.

2. BLANK INDORSEMENTS

A blank indorsement consists simply of the signature of the holder written upon the back of the instrument. It is effective for three purposes: (1) To transfer the instrument by negotiation so that the transferee becomes a holder; (2) to change the paper from order to bearer paper; and (3) to create a contract of indorsement by which the indorser becomes liable to pay the instrument in case the maker does not pay.

Where a bill or note is made to the order of P, and P indorses by simply signing his name on the back and delivers to A, such transfer is a negotiation, and A is a holder. The instrument has changed from order to bearer paper, so that any one in possession is a holder. The indorser, P, becomes liable on the instrument, to pay it if the maker fails to pay at maturity provided it is duly presented and due notice of dishonor given to P.

The instrument, originally order paper, changed to bearer paper by the blank indorsement, may be changed back to order paper by the special indorsement of A. So if A indorses "Pay B" signed "A," only B can further negotiate the instrument.

3. SPECIAL INDORSEMENT

A special indorsement consists of the signed order of the payee or indorsee to pay the instrument to a named person. It must be written on the instrument. Words of negotiability are unnecessary in an indorsement.

So "Pay John Jones" is the equivalent of "Pay to John Jones or order." Since the indorser has named a particular person to whom, or to whose order, the instrument is to be paid, it is clear that such instrument is order paper and will require the further indorsement of the special indorsee before it can again be negotiated. So a note made payable to P's order, specially indorsed by P to A, must be indorsed by A in order to be further negotiated. This does not mean, however, that the note cannot be *sold* without indorsement. The word "negotiation" is here used in the technical sense of the particular type of transfer necessary to constitute the transferee a holder. Order paper may of course be transferred without indorsement; but this operates as a mere assignment; the buyer getting the seller's rights and no more.

From the foregoing it will be seen that instruments payable to order on their face change from order to bearer paper according to whether the last indorsement is blank or special. If the last indorsement is blank, the instrument is special, it again becomes order paper. Remember that this is important, since, if bearer paper, any one in possession is a holder; whereas, if order paper, only *the indorsee in possession is a holder*.

On the other hand, as to instruments payable to bearer *on their face*, the rule is: Once bearer paper, always bearer paper. Section 40 of the Negotiable Instruments Law provides that "an instrument payable to bearer, specially indorsed, may nevertheless be further negotiated by delivery"; that is, no indorsement by the special indorsee is necessary to further negotiation. No

such instrument in the hand of a person other than the special indorsee is nevertheless in the hands of a holder.

ILLUSTRATIONS

1. M made his note for \$500 to P's order, and delivered it to P in payment of a used automobile which P agreed later to deliver. P sold the note to A for \$475, but did not indorse it. No automobile was ever delivered. On the due date A sued M, who pleaded that the consideration for the note had failed. The defense would be good. A is not a holder, not being an indorsee in possession, so cannot be a holder in due course. A is a mere transferee of the note. He can sue on it by proving his title by delivery, but his rights are those of his assignor, no more. The defense was good against P, so it is equally good against A even though A gave value, took before maturity, and without notice of the defense.

2. Had P *indorsed* to A, by any kind of indorsement, then A would be a holder, for such transfer would have been a negotiation and not a mere assignment. Being a holder, A would have been a holder in due course, since the other requisites already were present; and in the hands of a holder in due course the defense of failure of consideration is cut off. So M would have to pay the amount of the note to A, even though M had received nothing for it.

3. M made his note to P's order for an automobile which P delivered and expressly warranted to be in perfect condition. As a matter of fact, the engine was worn out and would not run. P indorsed the note by simply writing his name on the back, and mailed it to A in payment of a debt. It was stolen from A and sold by the thief to H, an innocent purchaser, for value and before maturity. On due date H called upon M to pay. M refused, and H sued M as maker, and P as indorser. M pleaded the defense of breach of warranty, and P defended on the ground that H had no title, since the note was stolen from A. Both defenses would be excluded. The note became bearer paper by P's blank indorsement. So H is a holder, being in possession of bearer paper, and a holder in due course by his purchase in good faith. A holder in due course takes an instrument free from personal defenses and outstanding claims of ownership.

4. M made his note to P's order, induced to do so by P's fraud. P indorsed in blank and delivered to A. A indorsed specially to B. B lost the note. The finder wrote the name of B on the back and sold it for value to H, an innocent purchaser. H sued M, A, and B on the instrument. M could plead his defense of fraud, and A and B could plead lack of title in H. Not being a holder in due course, all defenses are available against H, nor does he acquire any new title to the instrument. H is not a holder for the following reasons: The note, originally order paper, became bearer paper by P's blank indorsement. It later reverted to order paper when A indorsed specially to B, and, since the blank indorsement in B's name was a forgery, the instrument of course remained order paper. Being order paper, H, to be a holder, would have to be the indorsee in possession, which he is not. H, not being a holder, is not a holder in due course, so no defenses are cut off.

5. M made his note to P or bearer. P indorsed specially to A. A delivered to H, without indorsing. H is a holder, being in possession of bearer paper. A special indorsement is inoperative to change bearer paper on the face to order paper. It remains bearer paper, no matter what the kind of indorsement.

4. RESTRICTIVE INDORSEMENTS

A restrictive indorsement is defined by the Negotiable Instruments Law as one which either—

1. Prohibits the further negotiation of the instrument; or
2. Constitutes the indorsee the agent of the indorser; or
3. Vests title in the indorsee in trust for a third person.

The first type is illustrated by an indorsement "Pay A only," which by the very words of the direction prohibits further negotiation of the instrument, since the maker is instructed to pay to the restrictive indorsee and to no one else.

The second type is illustrated by an indorsement "Pay A for collection," which clearly indicates that the indorser has appointed A his agent to collect the instrument.

The third type vests title to the instrument in the indorsee in trust for a third person, as "Pay A for the use of B."

The first two types of restrictive indorsements constitute the indorsee an agent of the restrictive indorser, and carry notice to purchaser that the real ownership of the instrument is retained in the restrictive indorser. In the first type, negotiability is destroyed; and no transferee thereafter can be a holder. In other words, the rights of all purchasers after such indorsement can rise no higher than those of the restrictive indorsee. For example, if P indorses, "Pay A only," and B buys from A, B is not a holder, but a mere transferee. His rights are the rights of A, or of P if A was in fact P's agent and authorized to transfer.

In the second type of restrictive indorsement also a presumptive agency relationship is established between indorser and indorsee, but here further negotiation is only *suspended*, not prohibited. If P indorses, "Pay A for collection," and A finds himself unable to collect and so turns the instrument back to P, it is difficult to see why P cannot strike out his own indorsement to A and himself further negotiate; and it is clear that such is the law. In both types, the following is true: (a) The indorsee is agent of the indorser, so a purchaser from the indorsee would himself become only an agent of the indorser; and (b) beneficial ownership in the instrument is retained by the restrictive indorser, the indorsee getting only the bare legal title so as to enable him to sue on and collect the instrument.

In the third type of restrictive indorsement, "Pay A in trust for B," the restrictive indorser, P, has entirely divested himself of all interest in the instrument, vesting the bare legal title in A, so that A may sue on and collect the instrument and hold the proceeds in trust for the beneficial owner, B. Negotiability of the paper is not at all effected: and indorsement and delivery by A to X operates as a negotiation, and X can be a holder in due course, taking free from defenses of the maker available against A. But, of course, X gets notice from the indorsement that A holds merely as trustee for B, the beneficial owner, so X takes the instrument subject to the trust in B's favor, and must hold the proceeds for B.

BLAINE, GOULD & SHORT v. BOURNE & CO.

Supreme Court of Rhode Island, 1875. 11 R.I. 119, 23 Am.Rep. 429.

Assumpsit on a bill of exchange, heard by the court.

POTTER, J. The draft in question was as follows:

"Banking House of Blaine, Gould & Short,

"North East, Pa., August 16, 1873.

"Thirty days after date pay to the order of Frank Thayer
seven hundred dollars.

"To Messrs. B. G. Chace & Co., Providence, R. I.

“Due September 18.”

Thayer was the agent in Pennsylvania to make purchases for Chace & Co., of Providence, and he drew on them for payment.

This draft was indorsed by Thayer in blank, and was discounted by the plaintiffs before acceptance. The plaintiffs indorsed it as follows:

"Pay Jay Cooke & Co., or order, on account of Blaine, Gould & Short, North East, Pa. Alfred A. Short, Cash'r."

By Jay Cooke & Co. it was sent to the defendants in Providence for collection, indorsed as follows:

"Pay to the order of Messrs. Bourne & Co.

"Jay Cooke & Co."

The draft was paid by Chace & Co. to the defendants about noon of September 18. Jay Cooke & Co. stopped payment about 11 a. m. of that day, and about 1 p. m. of the same day their failure was generally known in Providence.

The draft was never the property of Jay Cooke & Co., and was never credited by them to the plaintiff, but was merely received by them for collection.

Jay Cooke & Co. were owing the defendants, and the defendants credited it in their account with them, and claim that they had a right so to do.

The rights of parties to bills forwarded for collection have been a fruitful source of litigation. Questions of this sort have generally arisen where some party becomes insolvent, and the contention is who shall bear the loss. * * *

A general indorsement of bills is *prima facie* evidence of property in the indorsee, and even where it is subject to any equity or trust between former parties, may change the legal property as to bona fide holders for value. *Collins v. Martin*, 1 B. & P. 648. But even where there is a general indorsement of paper sent only for collection, it will still remain the property of the sender as to all persons having notice. * * *

* * * it is contended that in this case the effect of the restriction in the indorsement was to give to all subsequent holders express notice of the trust, and we think this view of the plaintiff's counsel is correct.

The indorsee is rather an agent of the indorser with power of substitution, and the bill is still in the possession of the indorser by his agent. *Ex parte Sargeant*, 1 Rose, 153. The very mode of indorsement in this case shows that it is not a case of ordinary indorsement, and that no consideration has been paid for it. *Eadie & Laird v. E. India Co.*, 1 W.Bla. 295; also in 2 Burr. 1216. The bill must be taken by the holder subject to the trust; and, says Judge Story (on Agency, § 211), if he voluntarily consents to or aids in any other appropriation he is responsible; and says Judge Byles (On Bills, *157), he holds the bill or money as trustee for the restraining party, and is liable to the party making the restriction. The words are notice that the restricted indorsee has no property in the bill; that he is a mere trustee, and that he can appoint no sub-agent except for the purpose of holding the bill or money on the same trust, and if the holder pays it to the intermediate agent, he becomes responsible for its misapplication.

In the case of *Sigourney v. Lloyd et als.*, 8 B. & C. 622; also in 3 M. & R. 58, and in *Dan. & Ll.* 132; 2 Chitty Jun. on Bills, 1412, 1439, it was contended that an indorsement, "Pay to B. for my use," was a mere direction to B. as to the application of the money; but Lord Tenterden said that if it meant no more the words were useless; as he would be so liable without those words.

In that case the payee indorsed generally to A. A., the plaintiff, indorsed, "Pay B. or order for my use;" the defendants discounted it and applied it to the credit of B. B. failed, and it was held that the indorsement was sufficient notice to

prevent its transfer for the benefit of any other person; that all subsequent indorsees were trustees for the plaintiff; and that whoever advanced any money on it did it at his peril. And on appeal this judgment was confirmed by the Exchequer Chamber, the court holding that the money to whomsoever paid was in trust for the indorser. * * *

This custom of restricted indorsing is not of late origin, but is spoken of as usual in Snee et al. v. Prescott et als., 1 Atk. 245, 249, A.D. 1743; the object being, as there stated, to prevent the indorsement being filled up in such a manner as to pass the interest in the bill.

If the defendants in the present suit had paid the cash to Jay Cooke before hearing of the failure, it would have presented a different question. But they had no right to apply the money of the plaintiffs to the payment of a debt due to them (the defendants) from Jay Cooke. This is not such a payment as can protect them against a suit by the plaintiffs, the real owners.
* * *

Judgment for plaintiffs.

ILLUSTRATIONS

1. M's promissory note to P's order is indorsed by P, "Pay A only." A indorses especially to H, who gave value to A and took without notice of a defense M had against P. In an action by H against M on the note, M could set up the defense against H. The reason is that H is not a holder in due course because not a holder. H is a mere transferee from A, since there may be no further *negotiation* of the instrument after the restrictive indorsement. Being a mere transferee, H succeeds only to A's rights. But A is presumptively P's agent, so A's rights are P's. Consequently H's rights on the instrument rise no higher than P's, M has a defense available against P, so M has a defense available against H.

2. P indorses a note to his order, "Pay A Bank for deposit." A Bank indorsed: "Pay any bank or banker," and sent it to B Bank, which collected and retained the proceeds for a debt owed B Bank by A Bank. P sued B Bank to recover the pro-

ceeds of the note. P could recover. The restrictive indorsement gave B Bank notice that the restrictive indorsee, A, held merely as an agent for P, who retained beneficial ownership in the instrument and the rights to the proceeds. So B Bank in turn became merely P's agent to collect, with a duty to remit to P the proceeds.

3. P indorses a note, "Pay A for the use of B." A indorsed, "Pay H," and delivered it to H, who collected the note from the maker, M. H brought the note from A and gave value. B sued H to recover from him the proceeds of the note collected. B could recover. H merely got A's title as trustee for B, so H holds in trust for B and must account for the money collected.

4. M drew a note to the order of the Chemical Trust Company, which indorsed "Pay J. C. Smith for collection and return to the Chemical Trust Company." M paid the note to the restrictive indorser, the Chemical Trust. It later appeared that, in spite of the restrictive indorsement, Smith had actually bought the note from the Chemical Trust, and so was the owner of both the legal and beneficial title. Smith sued M. M's defense of payment to the restrictive indorser is good. The maker of a note may rely absolutely on the restrictive indorsement to assume that the holder of the note is only an agent for the restrictive indorser and has no ownership in the note.⁵

5. QUALIFIED INDORSEMENT

A qualified indorsement is made by adding the words "without recourse" to the signature of the indorser. It is effective: (1) To transfer the instrument by negotiation so as to constitute the transferee a holder; and (2) to relieve the qualified indorser from any liability on the instrument.

The holder of an instrument sometimes wishes to negotiate it without himself undertaking any liability to subsequent holders in the event of dishonor. This object may be accomplished by the qualified indorsement, or "indorsement without recourse," as it is commonly called. The transfer operates as a negotiation,

⁵ Smith v. Bayer, 46 Or. 143, 79 P. 497, 114 Am.St.Rep. 858 (1905).

not a mere assignment, so the purchaser is a "holder" as under any other kind of indorsement and may be a holder in due course to cut off personal defenses of the maker. Such holder's rights against all prior parties are exactly the same as though the words "without recourse" had been omitted, save that he may not hold the qualified indorser to any liability on the instrument.

ILLUSTRATION

1. M made his note to the order of P. P indorsed in blank and delivered to A. A wished to sell the instrument to B, but desired to avoid any personal liability to later parties in the event the note is not paid at maturity. He therefore indorsed, "Pay B, without recourse, A." B presented at maturity, and M refused to pay because the merchandise for which M gave the note did not comply with the contract. B sued M on the note, and P and A on their indorsements. (1) B could recover free from M's defense, as a holder in due course. B is an indorsee in possession, for value, and in good faith. (2) B could not recover against A, for by his indorsement without recourse A undertook no liability on the instrument.

6. TRANSFER OF ORDER PAPER WITHOUT INDORSEMENT

Where order paper is transferred without indorsement, the transferee is not a holder (since he is not "the indorsee in possession"), and therefore cannot be a holder in due course. Thus all defenses available against his transferor are available against him. However, transfer of order paper by delivery conveys legal title, and the transferee may sue in his own name by proving delivery from the prior holder. Such transferee gets the right to have his transferor indorse.

The transferee of unindorsed order paper gets only the right and title of his transferor. Such transfer does not operate as a negotiation, the transferee does not become a holder in due course, since he is not a "holder," and any defenses which the maker has against the transferor are equally available against the transferee. Also any defect in the transferor's title equally affects the title of the transferee.

Nevertheless, the mere fact that transfer is by delivery rather than by negotiation does not deprive the transferee of the right to collect the instrument and to sue upon it. Since he gets the rights of his transferor, if the transferor was a holder and could sue, so also may the transferee. But, since his right is thus derivative, he must prove the delivery to him and his transferor's title.

The transferee gets the additional right to compel his transferor to indorse. When this is done, he becomes a holder, and possibly a holder in due course. But here the rule is that, for the purpose of determining whether the transferee is a holder in due course, the negotiation shall be deemed to take effect as of the time when the indorsement was actually given. Negotiable Instruments Law, § 49, covers the situation as follows:

"Where the holder of an instrument payable to his order transfers it for value without indorsing it, the transfer vests in the transferee such title as the transferor had therein, and the transferee acquires, in addition, the right to have the indorsement of the transferor. But for the purpose of determining whether the transferee is a holder in due course the negotiation shall take effect as of the time when the indorsement was actually given."

ILLUSTRATIONS

1. M made a note to P's order in the sum of \$500, induced to do so by P's fraud. P sold the note to A, an innocent purchaser for value. At maturity, A sued M, who pleaded in defense that: (1) A, not being a holder, could not sue on the instrument; and (2) the defense of fraud is good as against A. (1) A may maintain the action by proving delivery from P, for A gets whatever title to the instrument P had. (2) M's defense of fraud is good as against A, for M could have pleaded the fraud in an action by P, and A gets no more than P's rights.

2. M drew a check to P's order, on the D Bank. P delivered the check for value to A, who took it to the D Bank and had it certified. After the certification, M ordered the bank to stop payment, as M had a defense to the check. The bank paid over the stop order, and M sued the bank to have his account recrated, on the ground that A was a mere transferee and that only a holder could procure a certification. M may not have his

account recrated. P had the right to procure certification and P's transferee, A, succeeded to P's rights.

3. P had a note payable to his order. P transferred it to A, for value but without indorsing it. The note was due June 1, 1935. In May, 1935, A learned that the note he had taken from P was procured by P fraudulently. A few days later A met P and reminded P that he had forgotten to indorse the note. P then indorsed it. At maturity the maker refused to pay, and, on A's bringing suit, offered the fraud as a defense. A claims to be a holder in due course so as to exclude the defense. A is not a holder in due course, as he had knowledge of the fraud on the day the note was indorsed to him, even though the actual transfer to A was before he had such knowledge. The act plainly states that the negotiation takes effect as of the time when the indorsement was actually made.

SECTION 3.—HOLDER FOR VALUE

One of the requirements for being a holder in due course is that one must be a holder for value. Value differs from consideration, for it means the giving up of something, and not merely a promise to give. Under the Negotiable Instruments Law, an antecedent or pre-existing debt constitutes value. If less than the face value of the instrument is given, the holder will be a holder in due course to no greater amount than he has paid out up to the time when he receives notice of defenses. Insufficiency of value makes no difference, except as it bears on the question whether the holder took the paper in good faith.⁶

Every negotiable instrument is deemed *prima facie* to have been issued for a valuable consideration; and every person whose signature appears thereon to have become a party thereto for value.⁷

⁶ Negotiable Instruments Law, §§ 52 (3), 25, 191, cl. 12. Despite the fact that value and consideration are well known and fully adjudicated not to be the same thing, Negotiable Instruments Law, § 25, says: "Value is any consideration sufficient to support a

simple contract." Furthermore, section 191, cl. 12, says: "'Value' means valuable consideration." These loose, inaccurate, and ineffective statements made in the statute only mislead.

⁷ Negotiable Instruments Law, § 24.

Where the holder has a lien on the instrument, arising either from contract or by implication of law, he is deemed a holder for value to the extent of his lien.⁸

Where value has at any time been given for the instrument, the holder is deemed a holder for value in respect to all parties who became such prior to that time.⁹

Of the five requisites to being a holder in due course and taking the instrument free from personal defenses of the maker, we have determined in sections 1 and 2 the first two, namely, form of negotiability and the manner of transfer necessary to constitute the transferee a holder. Three further requisites remain: What is value, before maturity, and good faith?

A debt barred by a bankruptcy decree or the statute of limitations, or any consideration sufficient to support a simple contract, will be sufficient to constitute value. Also a donee of an instrument will be a holder for value, if value has at any time been given for the instrument. Suppose that P loaned M \$100 and took M's negotiable note for that amount. If, then, P negotiates the note to A as a gift, A will nevertheless be a holder for value, though he himself parted with nothing in exchange for the note.

Money is, of course, value, and the amount of money given for the instrument is immaterial as affecting the question. If A give one dollar for a thousand dollar note, he will be a holder for value to the full amount of the note. The disproportion does not affect A's status as a holder for value, although it will be some evidence that he may be a holder in bad faith.

Crediting Bank Account not Giving Value.—Where a bank purchases an instrument, and simply credits the accounts of the seller, the bank is not a holder for value (and so not a holder in due course) of the instrument until it has actually paid out a substantial part of this credit. In determining whether the particular money credited has in fact been paid out, the rule is, first money in, first money out.

⁸ Id., § 27.

⁹ Id., § 26.

UNION NAT. BANK OF COLUMBUS v. WINDSOR.

Supreme Court of Minnesota, 1907.

101 Minn. 470, 112 N.W. 999, 118 Am.St.Rep. 641, 11 Ann.Cas. 204.

Action by the Union National Bank of Columbus, Ohio, against Samuel Winsor and others. Verdict for plaintiff. From an order denying a new trial, defendants appeal. Reversed.

ELLIOTT, J. The Union National Bank of Columbus, Ohio, brought an action against Samuel Winsor and 12 other persons to recover the sum of \$840 and interest thereon, alleged to be due upon a certain promissory note dated July 11, 1902, due July 1, 1905, signed by the defendants, payable to McLaughlin Bros., and by said payees claimed to have been transferred, sold, and assigned for a good and valuable consideration to the bank before maturity. The answer denied that the bank was a bona fide purchaser of the note for value before maturity, and alleged that the note was obtained by McLaughlin Bros. through fraud and false representation. * * * The court directed a verdict for the plaintiff on the ground that the undisputed evidence showed that the plaintiff bank purchased the note in good faith before it became due and paid therefor the sum of \$840. The appeal is from an order denying the defendants' motion for a new trial.

The question is whether the evidence required the court to direct a verdict in favor of the plaintiff. McLaughlin Bros. were dealers in horses, and through their agents sold a stallion to the appellants. The note upon which this suit was brought was one of three given as a consideration for a horse. McLaughlin Bros., who resided in Ohio, assigned and delivered the note to the Union National Bank of Columbus. It appears that the bank took the note in good faith without knowledge of the fraud; but it also appears that the bank paid McLaughlin Bros. nothing for the note. John R. McLaughlin, a member of the firm of McLaughlin Bros., testified that he sold the note to the Union National Bank and that the money received therefor was placed to the credit of McLaughlin Bros. * * *

Where a bank discounts paper for a depositor, and gives him credit upon its books for the proceeds for such paper, it is not a bona fide holder for value, so as to be protected against infirmi-

ties in the paper, unless, in addition to the mere fact of crediting the depositor with the proceeds of the paper, some other and valuable consideration passes. Such a transaction simply creates the relation of debtor and creditor between the bank and the depositor, and so long as that relation continues and the deposit is not drawn out the bank stands in the same position as the original party to whom the paper was made payable, even though the bank took the paper before maturity and without notice. By giving credit to the indorser on his deposit account the bank in effect agrees to pay him that amount of money on demand by check or order, and parts with nothing of value. As long as the amount thus credited remains undrawn by the depositor, the bank, if it receives notice of the fraud, is still in a position to return the note to the depositor and cancel the credit. * * *

The burden was upon the plaintiff to show that it paid a valuable consideration for the note. This it failed to do. The evidence shows that when the note was discounted the bank was the debtor of McLaughlin Bros. to a large amount, and that the only effect of the discount of the note was to increase the indebtedness by the amount of \$840. So long as McLaughlin Bros. did not reduce their account to less than \$840, the bank was not a purchaser of the note for value. Upon receiving notice of the fraud, it had the right to charge the note to McLaughlin Bros.' account and leave them to contest the validity of the note with the makers.

The order is therefore reversed, and a new trial granted.

ILLUSTRATIONS

1. The Santa Maria Sugar Company bought an electric hoist from the American Derrick Company, giving its note to the latter in payment. The derrick company discounted the note with the Corn Exchange Bank, which credited the derrick company's account. At that time the derrick company had a balance of \$30,000. The amount of this credit was \$20,000. Thereafter the derrick company checked out \$25,000. Then the bank was notified by the sugar company of a breach of warranty of the hoist for which the note was given. Thereafter the bank honored other checks of the derrick company to the amount of \$20,-

000. At maturity the bank sued the sugar company on the note. The latter defended on the ground of breach of warranty. The bank moved to exclude the defense on the ground that it was a holder in due course. Held, that this defense is good. The bank is not a holder in due course, because it was not a holder for value at the time when it received notice of defense. Under the rule, "first money in, first money out," the \$25,000 paid out before notice of the sugar company's defense was paid out of the original balance, not out of the credit for this note.

2. M gave P his note for \$500 for a truck. P negotiated the note to A for \$50, which A paid P. The truck was never delivered to M, and A learned of the failure of consideration. However, at maturity, A sued M for the face value of the note, \$500, claiming to have taken free from M's defense of failure of consideration, as a holder in due course. M claims that at most A can claim only as a holder in due course to the amount that he actually paid, \$50. Held, that A is a holder for value to the extent of the full face value of the note. The fact that A bought the note for one-tenth of its face is admissible in evidence to be considered by the jury on the question whether A took in good faith; but, on the question of value, since A paid all that he agreed to pay for the note, he is a holder for value to the entire amount.

3. Brown induced Smith to buy his farm by fraudulent misrepresentation. As part of the purchase price, Smith delivered to Brown his negotiable note for \$5,000. Before maturity, Brown negotiated (indorsed and delivered) the note to the X Bank, and the bank credited Brown's account with \$5,000. The bank is not a holder for value, and therefore not a holder in due course; consequently, in a suit on the note, Smith can set up the defense of fraud against the bank.

If at the time of the crediting of the \$5,000 for the note, Brown had \$1,000 in his account, and Brown drew a check for \$900, which was paid by the X Bank, this payment is presumed to be from the original \$1,000 balance, and does not constitute a payment from the \$5,000 credit.

SECTION 4.—HOLDER BEFORE MATURITY

A holder cannot be a holder in due course without having taken the instrument before it has become overdue. Even though he has taken a negotiable instrument, by negotiation, for value, and in good faith, if he has taken after maturity his rights against the maker are only equivalent to the rights of his transferor.

The fourth requisite to being a holder in due course is that the purchaser must have taken the instrument before it is due. The reason underlying this requirement is much the same as that which underlies the rule that the holder in due course must be one who takes in good faith. That an instrument is offered for sale after its maturity date, when presumptively the primary obligor should have paid it, raises an inference that the reason the instrument is unpaid and still in circulation is that the person primarily liable upon it has a good defense to such payment. Thus a purchaser after maturity is a person charged with notice of possible defenses, and therefore a bad faith taker. Indeed, the rule that a holder, in order to be a holder in due course, must have bought the instrument before maturity, was once part of the broader rule that he must take in good faith. It has become a rigid requirement separate and apart in itself, and now has little to do with the subject of good faith. To purchase an instrument a single day after maturity is to fail of being a holder in due course.

Where Instrument Bears a Fixed Date of Maturity.—Where the bill or note is payable at a fixed date, no doubt or difficulty can exist as to what is maturity. The instrument is due on the date it bears; and any purchaser after that date is a purchaser after maturity, and subject to all defenses the maker or drawer may have.

Maturity of Demand Instruments.—Where an instrument payable on demand is negotiated an unreasonable time after issue, the holder is not deemed a holder in due course. N. I. L. § 53. In determining what is a "reasonable time," or an "unreasonable time," regard is to be had (1) to the nature of the instrument;

(2) the usage of trade or business with respect to such instruments; and (3) the facts of the particular case. N. I. L. § 193.

Demand instruments are intended to circulate for some period of time called "reasonable"; but no test exists, either under the law merchant or under the Negotiable Instruments Law, to determine what is a reasonable time. The nature of the instrument is probably the most important factor. Checks, demand bills, and demand notes have each a differing period. Checks are the shortest lived. It is safe to say that, except under unusual circumstances, a check purchased ten days after issue would in all probability be purchased after maturity. Demand notes and bills of exchange have a longer life, but it is not possible to state any maximum of duration. Six months to a year might not be too long to discredit a demand note bearing interest.

SECTION 5.—HOLDER IN GOOD FAITH

To be a holder in due course, a holder must have taken an instrument complete and regular on its face, in good faith, and without notice of any infirmity in the instrument or defect in the title of the person negotiating it.

To constitute notice of an infirmity in the instrument or defect in the title of the person negotiating the same, the person to whom it is negotiated must have had actual knowledge of the infirmity or defect or knowledge of such facts that his action in taking the instrument amounted to bad faith.¹⁰

Where the maker of a note or the drawer of a bill has a defense to the instrument, such as fraud, or failure of consideration, or breach of warranty, it then becomes of importance to the holder to establish his position as that of a holder in due course, in order that he may shut out such defenses. It should be understood that, where there are no defenses, it is immaterial whether the instrument is or is not negotiable in form, or

¹⁰ Negotiable Instruments Law, §

whether or not the plaintiff is a holder in due course; for he may recover upon it then in any event. Therefore the portion of the law of negotiable instruments which we have examined thus far has application only to cases in which the party primarily liable on the bill or note has a complete defense.

What is Good Faith?—The final requisite of a holder in due course is that he be a purchaser in good faith without notice of defenses and defects in title of the person negotiating the instrument. To constitute notice of such defense or defect in title the purchaser must have had actual knowledge, or at least knowledge of such facts that his action in taking the instrument amounted to bad faith. Knowledge of facts, such as would put a reasonable person into the belief that the maker of the note has a defense, will amount to bad faith:

Good faith means without knowledge of the defense or lack of title. Knowledge means actual knowledge. It is not a question of whether the purchaser as a prudent man should have known, it is, Did he know? Good faith implies honest intent, and that may be present no matter how negligently the purchaser acted. For example, suppose A buys a check made to P's order and indorsed by P, from F, a finder, on F's representation that he is P. Failure by A to require identification of F before purchasing from him might be deemed carelessness in the extreme, yet it would not make A a bad faith taker. A becomes a holder in due course, acquiring a new title, even though his transferor, F, had no title; and P's title is cut off.

In certain situations the purchaser undeniably has knowledge of "such facts as makes his action in taking the instrument amount to bad faith." A purchase of a note from a known agent puts the purchaser on inquiry as to the agent's authority to sell. So, if H buys M's note made to the order of "P, as trustee," H has notice that P may not have authority to sell, and, if P has no authority, H gets no title. Also one who purchases an instrument with knowledge that it was issued in blank and filled up later by a subsequent holder takes subject to the original authorization as to filling up; that is, he knows that the instrument must be filled up in accordance with the authority given, so he is put on inquiry as to the original authorization.

ELIAS v. WHITNEY.

Supreme Court of New York, Appellate Term, 1906.
50 Misc. 326, 98 N.Y.S. 667.

Action by Joseph Elias against Leon A. Whitney. From a Municipal Court order setting aside a verdict in favor of plaintiff and ordering a new trial, plaintiff appeals. Affirmed.

TRUAX, J. The evidence showed that the check in suit had been changed before it reached the plaintiff, and that a mere inspection of the check showed such change. There is no evidence showing that the defendant authorized or assented to the alteration, but the appellant says that he is "a holder in due course," and not a party to the alteration, and that, under section 205 of the negotiable instruments law (Laws 1897, p. 745, c. 612), he may enforce payment on the check, according to its original tenor. Section 91, p. 732, of the negotiable instruments law, states what constitutes a holder in due course. According to that section, a holder in due course is a holder who has taken an instrument that is complete and regular on its face. This instrument was not complete and regular on its face at the time plaintiff took it. As we have stated before, a mere inspection of the instrument showed its defect, and therefore, under subdivision 41 of the negotiable instruments law, plaintiff had notice of an infirmity in the instrument at the time he took it.

The order appealed from is affirmed, with costs.

HARTINGTON NAT. BANK v. BRESLIN.

Supreme Court of Nebraska, 1910.
88 Neb. 47, 128 N.W. 659, 31 L.R.A., N.S., 130, Ann.Cas.1912D, 1008.

ROSE, J. This is a suit on a promissory note for \$400, dated June 18, 1907, and due six months hence. W. J. Breslin and John Wiebelhaus were makers and the Hartington National Bank was the payee and holder. The summons was not served on Breslin and the controversy is between the bank as plaintiff and Wiebelhaus as defendant. From a judgment on the verdict of a jury for the full amount of plaintiff's claim, defendant has appealed.

The substance of the defense pleaded is: Defendant and Breslin signed the note, but left a blank for the name of the payee. It was agreed between them that the note should be used by Breslin in purchasing a meat market at Fordyce from the owner whose name was at the time unknown but which afterward was found to be Jacob Hauri. In the event of a purchase Hauri's name was to be inserted in the blank, but otherwise the note was to be returned to defendant. The insertion of the name of the bank as payee was not authorized by defendant and he never consented thereto. The proof of these facts is uncontradicted. * * *

When the note was delivered to plaintiff it was a perfect instrument, with the exception of a blank for the name of the payee. It had not been altered and bore on its face no intimation of the agreements pleaded as a defense. Breslin delivered the note to plaintiff on or before June 20, 1907, and in addition to a cash payment it was accepted by the bank at its face value in full satisfaction and discharge of a mortgage on Breslin's property. Afterward plaintiff inserted its own name in the blank as payee, having had no actual notice of the alleged agreements between the makers. * * *

Section 14 (of the Negotiable Instruments Act) provides: "Where the instrument is wanting in any material particular, the person in possession thereof has a *prima facie* authority to complete it by filling up the blanks therein. And a signature on a blank paper delivered by the person making the signature in order that the paper may be converted into a negotiable instrument operates as a *prima facie* authority to fill it up as such for any amount. In order, however, that any such instrument when completed may be enforced against any person who became a party thereto prior to its completion, it must be filled up strictly in accordance with the authority given and within a reasonable time. But if any such instrument after completion is negotiated to a holder in due course, it is valid and effectual for all purposes in his hands, and he may enforce it as if it had been filled up strictly in accordance with the authority given and within a reasonable time." * * *

Within the meaning of this language, defendant became a party to the note "prior to its completion," and therefore in order that it may be enforced against him the blank "must be filled

up strictly in accordance with the authority given." *Guerrant v. Guerrant*, 7 Va.Law Reg. 639. That defendant gave plaintiff no authority to fill the blank with its own name is shown by uncontradicted testimony. The verdict against him, therefore, is not sustained by sufficient evidence—a question raised in both courts by an assignment of error. For this reason the enforcement of the statute requires a reversal, which is ordered.

Reversed and remanded.¹¹

RAYMOND CONCRETE PILE CO. v. FEDERATION BANK
& TRUST CO.

Supreme Court of New York, Special Term, New York County, 1940.
174 Misc. 206, 20 N.Y.S.2d 575.

EDER, J. L. P. O'Connor, Inc., was general contractor for the foundations of the public improvement of the city of New York, known as New Criminal Court and City Prison, Manhattan. It received a check for \$178,088.38 from the city as a payment on account of said public improvement which it deposited with the defendant bank in the ordinary course of business. It owed the defendant \$78,000 on a demand note which represented advances to the O'Connor concern,—moneys borrowed from time to time. After this check had cleared defendant charged the \$78,000 against the balance in the O'Connor account. There were at the time unpaid subcontractors and materialmen, among them the plaintiff and Bethlehem Steel Company.

Plaintiff herein is a subcontractor and sues on behalf of itself and other creditors who may come in and contribute to the expense of this action. The action is brought to impress a trust on the moneys defendant applied in payment of its said demand note against the O'Connor concern and reliance is placed on section 25-a, Lien Law, to justify a recovery, it being the contention of the plaintiff that this money, by virtue of said statute, consti-

¹¹ What was actually held in this case was that the plaintiff bank failed of being a holder in due course, so as to be able to recover on the instrument "as though it had been filled up in accordance with the au-

thority given" (sec. 14), because at the time the bank accepted the note in discharge of Breslin's debt, it contained a blank space with no payee filled in.

tuted part of a trust fund, inasmuch as the money was a payment made to a contractor for work done on a public improvement.

So far as the statute is here material, section 25-a of the Lien Law Declares: "The funds received by a contractor for a public improvement are hereby declared to constitute trust funds in the hands of such contractor to be applied first to the payment of claims of subcontractors, architects, engineers, surveyors, laborers and materialmen. * * *

The question here involved is this: Where a bank, knowing that moneys deposited with it by a contractor on a public improvement are moneys received by the contractor on account of such improvement, applies such moneys to the payment of a personal indebtedness of the contractor to the bank, is such bank liable for the claims of the mentioned statutory beneficiaries to the extent of such application, where the bank did not have knowledge of the existence of unpaid creditors when such application of the moneys was made? * * *

In Bonham v. Coe, 249 App.Div. 428, 433, 292 N.Y.S. 423, 429, affirmed, 276 N.Y. 540, 12 N.E.2d 566, the court, in discussing the right of the plaintiff to recover from a bank for moneys allegedly diverted from trust purposes, said: "That can only be done if the recipients took these payments with notice or knowledge that they were trust funds, and that such funds had been improperly diverted. Mere knowledge of the source of the money is not sufficient; there must also be knowledge of the violation of a trust duty." As also said by McLaughlin, J., in the Barclay case, *supra* [155 Misc. 684, 280 N.Y.S. 752]: "The question resolves itself into the simple proposition: Did the bank have sufficient facts upon which to charge it with notice of the character of the funds deposited?"

In the case at bar there is a total failure of proof by the plaintiff in all essential and vital elements necessary to be established to warrant a recovery. Its case rests on conjecture and surmise. Indeed, it is stated in the brief of the attorneys for Bethlehem Steel Company, as amici curiae: "There is no direct evidence that the bank knew, when it made the diversion, that there were any unpaid 'claims of sub-contractors, architects, engineers, surveyors, laborers and materialmen arising out of the improvement.' "

On the other hand, the defendant fully established by the testimony of its vice president Shanahan, that the payment of the O'Connor indebtedness to it was made in absolute good faith, and in the regular course of its business, which I find to be the fact. It becomes unnecessary, therefore, to consider or pass upon the defenses of a claimed banker's lien and right to equitable subrogation.

Judgment for the defendant must follow, dismissing the complaint upon the merits, with costs. Appropriate exception to plaintiff. Submit findings and judgment in accordance herewith, on notice.

ILLUSTRATIONS

1. A bought a note from P, the payee thereon. A had knowledge of the following facts: First, that the body of the note was in a different handwriting from that in the signature of the maker; second, that the payee had a reputation for shady dealing and generally dishonest conduct; third, that P, in selling, refused to give a general indorsement and insisted on indorsing without recourse. When A sued M, the maker, on the note, A found that P had fraudulently induced M to make the note. It is for the jury to determine whether A, at the time he took the note, had knowledge of such facts as to cause him to believe or suspect that M had a valid defense to the note. On these facts alone, A's bad faith is not so clearly and indisputably established that the judge may properly instruct the jury that A is a purchaser in bad faith.¹²

¹² "He is not bound at his peril to be on the alert for circumstances which might possibly excite the suspicion of wary vigilance; he does not owe to the party who puts the paper afloat the duty of active inquiry in order to avert the imputation of bad faith. The rights of the holder are to be determined by the simple test of honesty and good faith, and not by a speculative issue as to his diligence or negligence. The holder's rights cannot be defeated without proof of

actual notice of the defect in title or bad faith on his part evidenced by circumstances. Though he may have been negligent in taking the paper, and omitted precautions which a prudent man would have taken, nevertheless, unless he acted *mala fide*, his title, according to settled doctrine, will prevail." *Cheever v. Pittsburgh, S. & L. E. R. Co.*, 150 N.Y. 59, 44 N.E. 701, 34 L.R.A. 69, 55 Am.St.Rep. 646 (1896).

2. D drew a check to the order of the X Corporation. P, X's agent, indorsed, "X Corporation, by P, Treasurer," to A in payment of a personal debt owing from P to A. A, in receiving this paper, takes in bad faith and must return the check (or its proceeds if he has collected it) to the X Corporation. A had knowledge, from the form of the check and from the indorsement, that title to the check was in X Corporation and that P, in indorsing, was acting only as agent. Therefore A was put on inquiry as to P's authority to pass title to another's property in payment of his own personal debt.

3. Frost signed a note, "Pittsburgh Steel Co., by R. Frost, President," to the order of Bruen. Bruen indorsed the note to Frost, and then Frost negotiated it to plaintiff, Brooks, as security for a personal debt owed by Frost to Brooks. Brooks sued the steel company on the note, claiming as a holder in due course. Held that Brooks is a purchaser in good faith, for here he bought from Frost as from an individual, and not as from an agent.¹³

4. M signed a note with the amount blank and gave it to P, with authority to fill it in as soon as P had totaled the amount M owed P. P found this amount to be \$120, but filled it in, in the presence of A, for \$1,000, and sold it to A. A sued M on the note for \$1,000, claiming as a holder in due course. A is a purchaser in bad faith, since he knew that the note contained blanks to be filled in after delivery. A was therefore put on inquiry as to whether it was being filled in strictly in accordance with the authority given.

5. Smith agreed to pay Dr. Brown \$250 for a cancer cure, and delivered his negotiable note for that amount in payment. Dr. Brown negotiated the note to Green for \$200, but failed to give the treatment. Green sued Smith on the note, claiming to be a holder in due course, and therefore taking free from Smith's defense of no consideration. The evidence showed that this doctor had made a practice of similar transactions in the past, and that he always sold the notes to this plaintiff, Green.

It was held that Green was not a holder in due course, because he was a bad faith taker. Green had knowledge of suspicious cir-

¹³ *Cheever v. Pittsburgh, S. & L. E. R. Co.*, *supra*.

cumstances sufficient to put a reasonable person into the belief that a defense existed to the payment of this note, and therefore took subject to that defense.

SECTION 6.—HOLDER FROM A HOLDER IN DUE COURSE

A holder or transferee who takes from a holder in due course has the rights of a holder in due course. This is by application of the general rule of assignment of contracts, that an assignee gets the rights of his assignor. However, an exception exists, (1) in the case of a reacquirer, or (2) in the case of one who was a party to the original fraud or illegality affecting the instrument.¹⁴

A buyer of property gets what title his seller had; an assignee of a debt gets the rights of his assignor; thus it follows that a transferee of a negotiable instrument gets the rights of his transferor. If that transferor is a holder in due course, the transferee will necessarily have the rights of a holder in due course, even though such transferee takes after maturity, in bad faith and with knowledge of the maker's defense. Thus, if M gives his note to P, induced to do so by fraud, and P negotiates to A, a holder in due course, A's transfer to B, after maturity, as a gift, even assuming B to have had knowledge of the fraud, vests in B the rights of a holder in due course. Which is to say, that B may sue M, and, after proving that his transferor, A, was a holder in due course, B may recover against M in spite of M's defense. In other words, M's defense is no more available against B than it would have been against the transferor, A.

The Exceptions to the Rule.—There are two exceptions to the rule that a holder from a holder in due course is a holder in due course: First, one who was an actual party to the original fraud on the instrument cannot, by acquiring from a holder in due course, recover thereon free from the defense. This does not

¹⁴ Negotiable Instruments Law, § 58.

include the person who merely has knowledge of the defense, but means one who actually participated therein. Secondly, a holder not in due course of an instrument cannot better his position, selling the paper, and then later reacquiring it from a holder in due course. The rule is that the reacquirer is remitted to his former rights on the instrument.

Transferee from a Holder in Due Course.—Where the holder in due course of a negotiable instrument, instead of negotiating by indorsement, conveys title by a simple transfer of possession, the transferee gets the rights of a holder in due course, and can recover on the instrument, free from the maker's defenses. The transferee gets the rights of his transferor, and, since the transferor in such case is a holder in due course, his transferee succeeds to his rights. Since the transferee is not a holder, he cannot be a holder in due course; but the result is much the same, save that he must prove delivery to show his title and right to sue on the instrument.

DOLLARHIDE v. HOPKINS.

Appellate Court of Illinois, 1897. 72 Ill.App. 509.

Mr. Presiding Justice HARKER delivered the opinion of the Court. This is a suit on two promissory notes, executed by appellee [Hopkins] to M. Rumely & Co., and assigned to appellant [Dollarhide] before maturity. * * *

The notes in question were endorsed by Rumely & Company to appellant September 1, 1892, and endorsed by him to the First National Bank of Paris about 11th or 12th of September, but were afterward, and before the commencement of this suit, re-endorsed to the bank by appellant. It is contended, therefore, that even if it be held that there was a failure of consideration by reason of the breach of the warranty, and the condition for notifying Rumely in writing within one week after starting the machine was waived, then such defense can not prevail because appellant, when he received the notes from the bank, received them purged of all defense. In other words, the position is that a party having full knowledge of the defense which a maker may have to a promissory note at the time he received it, may purge

it of an equitable defense by merely assigning the notes to a third party and receiving them back at a subsequent time. We can not give our countenance to such a doctrine. Judgment for defendant affirmed.

ILLUSTRATION

1. Hills Bros. Company sold coffee to the Aragon Coffee Company, under a warranty, taking the note of the latter for \$3,000 in payment. Hills Bros. Company sold the note by indorsement to the National Park Bank, which was a holder in due course, taking for value before maturity and without notice that the warranty had been broken. The maker refused to pay at maturity. Thereafter Hills Bros. Company repurchased the note from the bank, and sued the maker on the note, claiming itself to be a holder in due course and therefore free from the defense of fraud in the procurement and that of breach of warranty. Held that Hills Bros. Company cannot recover. Although a holder taking from a holder in due course has the rights of a holder in due course, an exception to this rule exists in the case of the payee's repurchasing the paper, where the payee, as such, is subject to a defense. Hills Bros. Company, the payee on this note, is within this exception. It cannot cut off a defense by the device of negotiating to an innocent purchaser and then reacquiring from him.¹⁵

¹⁵ Aragon Coffee Co. v. Rogers, 105 Va. 51, 52 S.E. 843, 8 Ann.Cas. 623 (1906). Although Rogers was the nominal plaintiff, Hills Bros. Company appeared to be the real plaintiff.

The court considered that there was evidence to indicate a collusive purchase by Rogers in aid of Hills Bros. Company's fraud.

CHAPTER 3

RIGHTS OF THE HOLDER AGAINST MAKER AND ACCEPTOR

Section

1. Personal and Real Defenses.
 2. Acceptance.
-

SECTION 1.—PERSONAL AND REAL DEFENSES

Personal defenses are those defenses which, though not good as against a holder in due course, are good against certain parties, because of their participation in or knowledge of certain transactions or facts from which such defenses arise. Such defenses include all defenses that are not real or absolute defenses.

Real defenses are those which affect the reality of the obligation of the instrument itself; in other words, make the instrument void. Therefore, they are available even against a holder in due course, unless estopped by negligence.

Real defenses include, illegality, incapacity, forgery, material alteration, nondelivery of an incomplete instrument, and fraud in the inception. The reason why they are defenses good against even a holder in due course is that they are all of such a nature that no contract at all is formed.

Personal defenses do not affect the existence of the instrument itself as an obligation; they merely affect the personal rights of a particular holder against the maker. If M signs a note promising to pay P for an automobile to be delivered, until M receives the automobile he has a defense to the note in P's hands. Thus, failure of consideration, breach of warranty, and fraud in the inducement are examples of personal defenses.

Real defenses are those in which the very essence of contractual liability—intention to create the obligation—is lacking, or, if present, an intention to create an illegal obligation. For-

gery is a clear example. If a man's name is forged to an instrument, certainly it is not his contract.

Where there is a real defense, there never having been a contract in the beginning, the mere fact that the instrument is negotiated to a holder in due course cannot of itself create a contractual liability in the person who has only apparently assumed a liability in the making, drawing, or accepting of the instrument. It will be necessary to consider each of the real defenses separately.

1. FORGERY

Forgery is a real defense available even against a holder in due course.

Forgery is a real defense, available against any holder. It is obvious that a person whose name has been forged is not a party to the instrument and cannot be sued on it. It is not his contract. It is a great deal more just and equitable to throw the loss on the holder in due course, because he can recover from the person who sold him the instrument.

Defense of Forgery Estopped by Negligence of Maker.—Where the forgery of the maker's name was made possible by his own negligence, he will be estopped to plead the defense of forgery in a suit by a holder in due course. Thus, where a person uses a rubber stamp to sign his checks, and his clerk steals the stamp and by its use forges checks, which are duly cashed by the drawee bank, he cannot object to the charging of his account with these checks, for forgery will be estopped by reason of the maker's negligence in leaving the rubber stamp in his desk unlocked. Negligence is the failure to use the required degree of care. Had the owner of the stamp kept it locked in his safe, the bank could not have charged his account with the forged checks, for in that case there would be no negligence to constitute an estoppel.

The duty of care owned by a depositor to his bank requires him to call for and examine each month his canceled checks. Where during one month a forged check is paid by the drawee bank, and no objection is made by the depositor, and then during follow-

ing months other forgeries by the same hand are honored, the negligence of the depositor estops his defense of forgery as to these later checks, for, by failing to object, he has allowed the drawee bank to believe that the forged signature is genuine. His account cannot be charged with the first forgery, for here there is no estoppel; but as to the forged checks paid in the following months the depositor is estopped to deny the signature.

BASCH v. BANK of AMERICA NAT. TRUST &
SAVINGS ASS'N.

Supreme Court of California, 1943. 22 Cal.2d 316, 139 P.2d 1.

Action by Carlo Basch against the Bank of America National Trust and Savings Association to recover the amount paid by defendant on forged checks drawn against plaintiff's account with defendant. Judgment for plaintiff, and defendant appeals.

Affirmed.

CURTIS, J. For many years the plaintiff, Carlo Basch, owned and operated a retail drugstore—Basch's Pharmacy—in San Francisco, and since the establishment of such business he had maintained a commercial account in its name with the defendant bank at the main office at No. 1 Powell Street in said city. In May, 1938, he employed as a part-time bookkeeper one Herbert C. Lahr, who thereupon took charge of the office routine matters in connection with his employer's bank account and faithfully performed his work for the ensuing five months. About the first of November of said year Lahr conceived the scheme of fraudulently diverting from this bank account sums of money for his own use, and between November 3, 1938, and September 9, 1939, he forged plaintiff's signature to a series of one hundred and twenty-seven checks payable to himself, all but four of which called for the payment of \$37.50 each. These checks cashed in various places by Lahr and in due course presented to the defendant's main office, were paid by the bank and, together with the genuine checks drawn during the same period, were charged to plaintiff's account. Plaintiff did not examine the bank's monthly statements or inspect the accompanying canceled checks as they were forwarded to him at regular intervals, but he dele-

gated that duty to his bookkeeper Lahr. Consequently the forgeries were not discovered by plaintiff until the early part of September, 1939. * * *

It is settled law that a bank in receiving ordinary deposits becomes the debtor of the depositor, that its implied contract with him is to discharge this indebtedness by honoring such checks as he may draw upon it, and that in so doing it is charged with knowledge of its depositor's signature. * * * Consequently, a bank pays a forged check at its peril; and in such event, payment in legal contemplation will be considered to have been made from the bank's own fund so that it has no right to charge the depositor's account with the amount disbursed contrary to his genuine order, and it will be liable to him for so doing. Its responsibility in such case is and should be, rigid. * * * [Citations omitted.] While no degree of care on the part of the bank will excuse it from liability, it may justify the payment of a forged check on principles of estoppel, or on the basis of negligent or misleading conduct of the depositor which directly or proximately caused the bank to pay. However, the bank must show due diligence before it can assert such defenses. [Citations omitted.]

"The weight of authority, and perhaps of reason, supports the view that when a depositor's passbook has been written up and returned to him with canceled checks which have been charged to his account, it is his duty to examine such checks within a reasonable time, and if they disclose forgeries or alterations to report them to the bank, failing in which he cannot, if his failure results in detriment to the bank, dispute the correctness of payments thereafter made by it on similar checks.

"This rule, however, assumes that the bank itself has not been guilty of negligence in making the payment, for when by the exercise of proper care it could have discovered the alteration or forgery, it must bear the loss notwithstanding that the depositor failed in his duty to examine the accounts. [Citing numerous authorities from other jurisdictions.]" * * *

Measured in the light of the foregoing legal principles, the undisputed facts in this case establish beyond doubt that plaintiff was guilty of negligence not only in failing to exercise ordinary care and prudence in entrusting his employee Lahr with his

banking affairs, but in disregarding the duty imposed upon him by law to examine and verify the bank's monthly statements and corresponding returned checks in relation to his own books of account. * * *

The remiss conduct of the depositor in such cases as this is available as a defense to the bank *only* where it appears that the bank itself is free from negligence in the first instance in the payment of the forged checks. If in the exercise of due care the bank would have detected the forgeries without the aid of the depositor, the bank cannot then escape its contractual liability merely because the depositor was also at fault. * * *

There is substantial evidence indicating that by the exercise of proper care and skill the bank's employees could and should have discovered some of the forgeries. In this connection the record shows that eighty-three of the series of forged checks were produced by plaintiff at the trial and were received in evidence; that some twenty of those so produced were shown to the teller who had been in charge of the division handling plaintiff's banking account during the period of the forgeries, and some three or four years prior thereto; that after inspecting these twenty checks, he admitted that several of them bore evidence of forgery and should not have been passed. Three of those so specified by him were of the group of four forged and cashed during the first month of Lahr's criminal undertaking—November, 1938. * * *

* * *

Nor can it be said under this state of the record that the unavailability of forty-four of the forged checks for production at the trial precluded a finding by the jury that the bank was responsible to plaintiff for their payment. It appears from the evidence that the missing group consisted of all the forged checks cashed during the months of December, 1938, and January, February, March and May, 1939. * * * The fact that Lahr employed the precise same modus operandi with respect to all of the forgeries—that is, he traced plaintiff's genuine signature from a legitimate check onto the forged one under the conditions heretofore outlined—gives rise to a reasonable inference that the checks destroyed were substantially similar in appearance to the eighty-three introduced as exhibits in the course of the

trial. Moreover, as previously noted, the four checks forged in the first month were in evidence and the bank's teller particularly concerned with plaintiff's account conceded that three of them were obviously forgeries and should not have been passed. Had these been exposed by the bank, the subsequent forgeries would not have occurred. *Critten v. Chemical National Bank*, 171 N.Y. 219, 63 N.E. 969, 973, 57 L.R.A. 529. * * * These several observations relating to the bank's uniform treatment of the entire series of forged checks and its employees' failure to exercise reasonable diligence in the handling of plaintiff's banking account over the ten-month period here involved constitute ample support for the jury's implied finding that the bank was as negligent in cashing the missing checks as it was in cashing the ones in evidence—that the same considerations governed in measuring the liability for the total resulting loss.

In such situation there is no basis for invocation of the doctrine of equitable estoppel in bar of plaintiff's claim for the amount represented by the missing checks. * * *

[Judgment for plaintiff affirmed.]

2. MATERIAL ALTERATION

N. I. L. section 124. Where a negotiable instrument is materially altered without the assent of all parties liable thereon it is avoided * * *. But when an instrument has been materially altered and is in the hands of a holder in due course, not a party to the alteration, he may enforce payment thereof according to the original tenor.

N. I. L. section 125. Any alteration which changes the date, the sum payable, either for principal or interest, the time or place of payment, the number or relations of the parties, the medium or currency in which payment is to be made, or which adds a place of payment where none is specified, or any other change or addition which alters the effect of the instrument in any respect, is a material alteration.

Where an instrument has been materially altered, it is avoided as between the parties. If the payee sues, he is met with the complete defense of the maker that the instrument sued on is not the instrument he signed. It is not his contract. This defense was

good even as to a holder in due course, prior to the Negotiable Instruments Law. That statute has, however, weakened the defense by providing that, in the case of a holder in due course, recovery may be had on a materially altered instrument according to its original tenor. Negotiable Instruments Law, § 124.

Material alteration, therefore, is a real defense, available even against holders in due course, as to all changes effected upon the instrument. Thus, where a \$100 note is raised in amount to \$1,000, the maker may plead the defense against any holder, and cannot be held liable even in the case of suit by a holder in due course for more than the original amount, \$100.

There may, however, be an estoppel to plead the defense. Where the drawer negligently leaves unfilled spaces upon the instrument, so that the amount payable is raised, and the raised amount is paid by the drawee bank, the account of the drawer may be charged for the full amount. The drawer's negligence estops his defense of material alteration. It is said that in the contract of deposit there is an implied term that the drawer will use care in the drawing of his checks. The duty of care being created by contract, a breach of the duty is negligence, and the drawer is thereby precluded from denying that the instrument sued on is his contract.

As to a voluntary purchaser of an instrument, however, leaving blank spaces is not such negligence on the part of the drawer as will estop his defense of material alteration, even though the holder suing be a holder in due course. By the majority rule, leaving blanks is not negligence, since there is no presumption that future holders will act dishonestly by altering the instrument, even though it is easy for them to do so. There being no negligence and no consequent estoppel, the maker or drawer may set up as against a holder in due course the alteration.

NATIONAL EXCHANGE BANK OF ALBANY v. LESTER.

Court of Appeals of New York, 1909.
194 N.Y. 461, 87 N.E. 779, 21 L.R.A., N.S., 402, 16 Ann.Cas. 770.

The defendant was sued as the accommodation indorser upon a note for \$375 made by one Frank L. Fancher and acquired by

the plaintiff bank before maturity in the regular course of its business. The defense was that the note as originally made and indorsed was for \$75 only; that the maker thereafter, without the knowledge or consent of the indorser, altered the note by inserting in the body thereof the words "three hundred" immediately in front of the words "seventy-five" and the figure "3" immediately in front of the figures "75," thereby making the instrument apparently a note for \$375 instead of \$75; and that the maker thereafter caused the note as thus altered to be discounted by the plaintiff bank. The answer prayed judgment that the complaint be dismissed except as to the amount of the note before alteration, together with interest and protest fees, to wit, \$78.66. The defendant also served an offer to allow the plaintiff to take judgment for that amount. Upon the trial the court charged the jury that, if the note indorsed by the defendant was in fact a note for \$375 on its face, the plaintiff was entitled to recover that amount and interest.

The trial judge further charged the jury that if they found that there were spaces upon the note, "so carelessly and negligently left by this indorser, Mr. Lester, that a person having custody of the note might run in a figure 3 and the words "three hundred" so as not to occasion in the mind of the indorser [evidently meaning indorsee] any inquiry into its validity," they might find that the indorser conducted himself carelessly and negligently in the premises, and thus invited the liability which the face of the note called for when presented to the bank. The defendant duly excepted to that part of the charge to the effect that, if the defendant was negligent in leaving blank spaces, the jury must find a verdict for the plaintiff for the full amount of the note as it stood. The court then reiterated the proposition, saying that, "if the jury find that the defendant was careless and negligent in leaving vacant spaces for the words and figures, such carelessness and negligence on his part would still make him liable for the note"; and to this the defendant also excepted.

The jury found for the plaintiff in the sum of \$375, with interest. The judgment entered upon the verdict has been unanimously affirmed by the Appellate Division.

WILLARD BARTLETT, J. (after stating the facts as above). As this case went to the jury, they might well have found that the

note in suit was a note for only \$75 when originally prepared by the maker and indorsed at his instance by the defendant, and that it has subsequently been altered to a note for \$375 when discounted by the plaintiff bank. They were instructed in substance, however, that the indorser was liable for the amount of the note as raised by the alteration, if he had been careless and negligent in placing his name upon the instrument while there were spaces thereon which permitted the insertion of the words and figure whereby it was transmuted from a note for \$75 into a note for \$375. Conceding that the contract which he actually signed bound him only to pay the smaller amount, the jury were permitted to find that in consequence of his negligence in the respect indicated it had become a contract which bound him to pay the larger amount to a subsequent innocent holder of the paper.

* * *

To sustain the judgment in the case at bar in view of the instructions under which the issues were submitted to the jury, we must hold that the indorser of a promissory note, the amount of which has been fraudulently raised after indorsement by means of a forgery, is liable upon the instrument in the hands of a bona fide holder for the increased amount, because of negligence in indorsing the same when there were spaces thereon which rendered the forgery easy, though the note was complete in form. To do this would be to create a contract through the agency of negligence; for the action is not in tort for damages, but upon the contract as expressed in the note. But, apart from any question as to the form in which the indorser is sought to be charged, I am of opinion that no liability on the part of the indorser for the amount of such a note as raised can be predicated simply upon the fact that such spaces existed thereon. This conclusion I base upon the authorities to that effect which I have already discussed, and upon what seems to me to be considerations of sound reason independent of judicial authority.

An averment of negligence necessarily imports the existence of a duty. What duty to subsequent holders of a promissory note is imposed by the law upon a person who is requested to indorse the paper for the accommodation of the maker and who complies with such request? It is a complete instrument in all respects—as to date, name of payee, time and place of payment, and amount. There are, it is true, spaces on the face of the in-

strument in which it is possible to insert words and figures which will enlarge the amount and still leave the note apparently a genuine instrument; in other words, there is room for forgery. On what theory is the indorser negligent because he places his name on the paper without first seeing to it that these spaces are so occupied by cross-lines or otherwise as to render forgery less feasible? It can only be on the theory that he is bound to assume that those to whom he delivers the paper or into whose hands it may come will be likely to commit a crime if it is comparatively easy to do so. I deny that there is any such presumption in the law. It would be a stigma and reflection upon the character of the mercantile community and constitute an intolerable reproach of which they might well complain as without justification in practical experience or the conduct of business.

That there are miscreants who will forge commercial paper by raising the amount originally stated in the instrument is too true, and is evidenced by the cases in the law reports to which we have had occasion to refer; but that such misconduct is the rule, or is so general as to justify the presumption that it is to be expected and that business men must govern themselves accordingly, has never yet been asserted in this state, and I am not willing to sanction any such proposition either directly or by implication. On the contrary, the presumption is that men will do right rather than wrong. See *Bradish v. Bliss*, 35 Vt. 326. As was said by Judge Cullen in *Critten v. Chemical Nat. Bank*, 171 N.Y. 219, 224, 63 N.E. 969, 57 L.R.A. 529, it is not the law that the drawer of a check is bound so to prepare it that nobody else can successfully tamper with it. Neither is it the law that the indorser of a promissory note complete on its face may be made liable for the consequences of a forgery thereof simply because there were spaces thereon which rendered the forgery easier than would otherwise have been the case.

I think the judgment of the Appellate Division should be reversed and a new trial granted, with costs to abide the event.

ILLUSTRATION

1. Miller drew two checks for \$10 each, payable to Parks or order, carelessly leaving blank spaces before the words and fig-

ures. Parks inserted the figure "5" in front of the figure "10," and the words "five hundred" before the written amount, thus raising the amount of each check from ten to five hundred and ten dollars. Parks sold both checks to Allen, an innocent purchaser for value and before maturity. Allen cashed one at the drawee bank, and Miller's account was charged, but the other was dishonored for insufficient funds. Miller sued the drawee bank to have his account recrated with \$500, the raised amount of the first check, and Allen sued Miller on the second check for \$510. (1) Miller cannot get his account recrated on the first check. His negligence as to the drawee bank estops his showing the material alteration. (2) Allen can recover only \$10 on the second check, as here Miller's defense of material alteration is available.

The situation of the drawee bank differs from that of the ordinary holder in due course, in that the drawer owes to the bank the highest degree of care both in execution and custody of instruments drawn on the bank. This is because the bank upon which a depositor's check is drawn must pay at peril of breaching the contract of deposit; whereas the holder of such an instrument purchases it voluntarily and at his own option.

2. FRAUD IN THE EXECUTION

Fraud in the execution is a real defense available against any holder unless there is an estoppel to plead it. Fraud in the execution exists wherever the maker who signs does not know and so does not intend to execute the instrument he signed.

Where a party is induced to sign a negotiable instrument by fraudulent misrepresentations concerning the property offered in exchange for the instrument, the fraud is in the inducement, and is only a personal defense, not available against a holder in due course. In such a case the signer actually knows that he is putting his signature to a negotiable instrument, and that it may fall into the hands of an innocent purchaser. Where, however, the fraud is of such nature that the maker does not, and could not by the exercise of reasonable care, know that the paper he is signing is a negotiable instrument, this is fraud in the execution, a real defense available against any holder.

Negligence as Estoppel.—Wherever by the exercise of ordinary care the maker could have known what he was signing, his failure to read the paper constitutes negligence, which will estop him from setting up the defense of fraud in the execution, in any suit by a holder in due course. So, where M signs a negotiable note to the order of P, believing it to be a receipt, according to P's statement, M would be estopped, by his negligence in failing to read what he was signing, from setting up his defense of fraud in the execution, in a suit on the note brought by a bona fide holder from P.

GROSS v. OHIO SAVINGS & TRUST CO.

Supreme Court of Ohio, 1927. 116 Ohio St. 230, 156 N.E. 205.

MATTHIAS, J. The principal contention between the parties in this case arises from the defense that the note sued upon was procured by fraud and trickery upon the part of the agents of the Union Drug Company, the payee of the note. [The defendant, Gross, signed what he thought was a paper subscribing to stock in the Drug Company. Hidden in the printed provisions was a promissory note regular in form as soon as out from the sheet.]

Gross further testified that he had known Hill many years and had confidence in him; that nothing was said about signing a note; that the paper he signed was about the size of the old foolscap sheet, the whole surface of which was covered either with printing or with writing filling in the blank spaces; that the note which came to the bank was about one-fourth the size of the paper he signed, and that before he signed it Hill had said of it, "Here is the paper filled out with the amount of stock we agreed on, 20 shares of preferred and 8 shares of common." Gross then testified that he "sketched down the paper and seen it was there and signed it." The paper was signed in two places, the separate subscription for stock and the promissory note.

The testimony of Gross, as shown by the record, discloses that at the time of the occurrence detailed Gross was 64 years of age; had lived in Athens about 30 years, where he had been engaged in the mercantile business; was interested as a stockholder and a member of the board of directors of an oil company in that vicinity, and also to some extent as an independent operator, taking

leases and drilling for oil. His eyesight with glasses was "pretty fair," and his hearing such that he could hear ordinary conversation. The record further discloses that the paper signed by Gross was taken to the office of the Union Drug Company, at Canton, and there turned over to the secretary of the company, where it was cut in two, thereby severing the subscription for stock from the promissory note. The record discloses only a copy of the note, and not the entire paper described by the president of the drug company as a subscription blank with a note attached. The subscription contract was filed in the office of the secretary, and the note came into the possession of the president of the drug company, who testifies to his negotiation and sale of it to the plaintiff, the Ohio Savings & Trust Company. * * *

The distinction must be kept in mind between cases in which a party, through fraudulent representations, signs an instrument which he intends to be a negotiable promissory note, usually referred to as fraud in the inducement, and those where through fraud and misrepresentation or deceit and trickery his signature is procured to a negotiable promissory note, when he had no intention or purpose to sign any such instrument, termed fraud in the inception of the instrument. It is quite well settled that fraud in the transaction out of which the instrument arose, or in respect to the consideration for which it was given, is no defense against a holder in due course. A different rule prevails where the signature of the maker of a negotiable instrument was obtained by fraudulent trick or device and the maker did not know that the paper he was signing was a negotiable instrument and had no intention of making or delivering such instrument. 3 Ruling Case Law, 1008. * * *

It is disclosed by the record that the note sued upon in this case is in the usual form, and in type clear and distinct. The most casual observation makes manifest its terms as well as its force and effect. The defendant had full opportunity to read it. He states he "sketched it". There is no dispute in the evidence, and one of two inferences necessarily follows: The defendant either knew he was signing a promissory note, or he was grossly negligent in failing to observe that the instrument immediately preceding his signature was a negotiable note. The promissory note was without any condition whatever, and there was no alteration of its terms or provisions.

Particularly applicable to this class of cases is the language used by the court in *Douglass v. Matting*, 29 Iowa 498, 4 Am.Rep. 238:

"It is better that defendant, and others who so carelessly affix their names to paper, the contents of which are unknown to them, should suffer from the fraud which their recklessness invites, than that the character of commercial paper should be impaired, and the business of the country thus interfered with and unsettled."

[In affirming the judgment below, the court held the defendant maker estopped, by his negligence in failing to read the paper he signed, to plead the defense of fraud in the execution.]

ILLUSTRATIONS

1. M was signing a receipt to be handed to P. By a trick P obtained M's signature to a check by the use of carbon paper concealed under the paper on which the receipt was written. May a holder in due course recover from M on this check? Probably not. Assuming that M signed without negligence, he has never given effect to the check as a contract, so that the result is the same as though his name had been forged.

2. P induced M to sign a negotiable note by telling M that it was merely a memorandum of a past transaction between them. M was illiterate and could not read, and there was no one else available for M to call in to read it to him. The note was negotiated to a holder in due course, who sued M. Can M set up the facts as a defense? Yes. No estoppel here, because M was not negligent. He could not read, and there was no one available at the time whom he could have called upon to read it to him. Consequently the real defense of fraud in the execution is available.

3. Miller agreed to buy from Potter, a nursery salesman, a shipment of small trees and shrubs, the goods to be paid for within ten days after receipt thereof. Miller signed a paper prepared by Potter, which appeared to be a memorandum of the contract. Miller read the paper before he signed it, and he understood it to be nothing more than what Potter said it was, a contract to

purchase the shrubs. As a matter of fact, it contained in the body of the writing a negotiable promissory note. Potter cut from the paper this signed note, and discounted it at the local bank.

Miller would have to pay the note at maturity to the bank. Since he did not know he was signing a note, there was fraud in the execution; but, since he failed to exercise reasonable care to learn the nature of the paper he was signing, this negligence creates an estoppel to plead the real defense. It is not enough to read the paper before signing; the signer must also know its legal effect.

Most instances of fraud in the execution are accompanied by circumstances creating an estoppel to plead the defense. It is only where the signer is blind, or illiterate, and cannot read, and there is no one available to read the paper to him, that the element of negligence is not present, and the maker will not be estopped to plead the defense of fraud in the execution. Being made to sign a note while under the influence of drugs or liquor to such an extent that the signer did not know what he was doing would probably constitute fraud in the execution, under circumstances where there was no negligence to estop the defense.

3. NONDELIVERY OF INCOMPLETE INSTRUMENT

Negotiable Instruments Law, § 15, provides: "Where an incomplete instrument has not been delivered, it will not, if completed and negotiated without authority, be a valid contract in the hands of any holder."

Thus nondelivery of an *incomplete* instrument is a real defense available against a holder in due course, unless for some reason the maker is precluded from showing nondelivery. The reason is not difficult to seek. Where one signs a note, leaving the name of payee or the amount blank, and leaves the paper in his desk without delivering it, no contract has as yet been created. If the paper is stolen, filled in, and sold to an innocent purchaser, it yet remains what it originally was, only a piece of paper evidencing a nonexistent contract. Negotiation to a holder in due course cannot create contractual liability on what never was a contract.

However, negligence of the maker in custody of the undelivered instrument may impose liability, by precluding the maker from proving that what is apparently his contract never was a contract at all. Here again the same distinction is made between the position of the drawee bank having paid an undelivered check and the position of a holder in due course who has simply purchased the instrument. As between the depositor and his drawee bank, the former owes to the latter the highest degree of care possible. The mere signing of a check in blank, no matter how much care the drawer takes in its safe-keeping, will, if the instrument is stolen, and paid by the drawee bank, constitute negligence to estop the defense of nondelivery. The drawer owes his bank the duty of putting his name on a check only for the purpose of directing the bank to pay, and, if he signs a check in blank, the risk is his. As to an ordinary holder in due course, however, the defense of nondelivery will be good, in the absence of actual negligence in custody of the instrument.

TRUST CO. OF AMERICA v. CONKLIN.

Supreme Court of New York, Appellate Term, 1909. 65 Misc. 1, 119 N.Y.S. 367.

LEHMAN, J. The plaintiff seeks to recover from the defendant for an overdraft of his account. It appears that the overdraft arose from the fact that the defendant left the city, and upon his departure gave his bookkeeper a number of checks, signed by him in blank, in order to provide funds for use in his business. His bookkeeper locked the checks in a drawer of the safe. One of the defendant's employés knew where the key was hidden, abstracted a blank check, and filled in the blank so that it apparently became a complete instrument payable to bearer for the sum of \$200. * * *

If, therefore, the plaintiff has shown a right to charge the account of this defendant, even though that right arises by reason of the negligence of the defendant, then the plaintiff may recover herein, although the action is, in form, based on contract.

The courts of this state have been, however, averse to allowing recoveries on the ground of negligence of a party to an in-

strument, and even in the case cited above there is a dictum that the bank is liable for payment of a check where a material part has been altered, "even though it has been done so skillfully as to defy detection by examination." In the recent case of National Exchange Bank v. Lester, 194 N.Y. 461, 87 N.E. 779, 21 L.R.A.,N.S., 402, the court held that the indorser of a promissory note, the amount of which had been fraudulently raised after the indorsement by means of a forgery, is not liable upon the instrument in the hands of a bona fide holder for the increased amount because of negligence in indorsing the instrument, when there were spaces thereon which rendered the forgery easy, although the note was complete in form. * * *

In the present case we have two causes intervening to produce a check which the defendant did not intend to order the plaintiff to pay. The defendant delivered the check, signed in blank, to an agent upon whose fidelity he was bound to rely, and the blanks were subsequently filled in, not by his own agent, but by one who obtained the check through a crime. I do not think that the defendant's agent can be considered negligent in his care of the instrument. It is true that it was stolen; but he kept it locked up in a drawer under circumstances that showed at least reasonable care, and he could not presume that a trusted porter would turn out to be a clever thief. If the defendant is liable at all, it is because he owed the bank a duty which he violated by signing the check in blank.

We may, for the purpose of this appeal, dismiss entirely the question whether the defendant would be liable to a bona fide holder for value. The question before us is entirely one concerning the duties of a depositor to his bank. That a depositor owes a real duty of care to the bank has been frequently decided, and this duty is greater than that which the maker of an instrument owes to subsequent holders for value. A purchaser of a negotiable instrument can take it or not, at his option, and usually, at least to some extent, relies upon the responsibility of the last holder. A bank, however, must at its peril pay out the money deposited, if the depositor directs him to do so. "The text-books are unanimous in asserting that where a drawer of a check has prepared his check so negligently that it can be easily altered without giving the instrument a suspicious appearance, and alterations are afterwards made, he can blame no

one but himself, and that in such case he cannot hold the bank liable for the consequences of his own negligence in that respect.

* * * The facts disclosed by the record peculiarly call for the application of the rule, which we think sound upon principle, as well as authority." Timbel v. Garfield Nat. Bank, 121 App. Div. 870 at pages 872, 873, 106 N.Y.S. 497 at pages 499, 500.

In this case a depositor has signed a blank check, and has made it possible for a person obtaining the check, not only to successfully tamper with it, but has facilitated, if not invited, the forgery which was actually successfully completed. In one sense he may not have been negligent. It is possible that even a careful man might be willing to assume the risk of theft; but he owed a duty to the bank to put his signature upon a blank check only for the purpose of directing it to pay out the money, and, however slight the risk, the depositor is the person who has assumed it. The bank could not discover the forgery in any possible way, because his act had rendered such discovery practically impossible, and by virtue of his contractual relation to the bank he is now bound to pay back to the bank the money which it has paid out.

The judgment should be affirmed, with costs. All concur.

LINICK v. A. J. NUTTING & CO.

Supreme Court of New York, Appellate Division, Second Department, 1910.
140 App.Div. 265, 125 N.Y.S. 93.

BURR, J. On July 20, 1909, plaintiff signed his name to a blank check. Thereafter David Ryckoff and Benjamin Silberman stole the check, filled in the name of F. A. Mann as payee and the sum of \$147.87 as the amount thereof, and presented it to the State Bank, where plaintiff kept his account, and procured it to be certified. Thereafter they indorsed said check with the name of F. A. Mann and passed it to defendant for value, who collected the amount thereof from the said bank. Plaintiff, having taken up said check from the bank, now sues defendant as for money had and received for the amount of the check.

* * *

None of the circumstances connected with the theft of this paper appear, except that it was stolen, and that the persons

guilty of the crime have been tried, convicted, and sentenced for the same. Plaintiff, therefore, cannot be charged with negligence giving rise to an estoppel, unless a man is guilty of negligence in writing his name upon a piece of paper which by some possibility may afterwards be stolen from him, which paper afterwards comes into the hands of a third person who is an entire stranger to the transaction, with words written over the signature which are sufficient in form to make it a check or note. Actionable negligence involves, first, the existence of a duty; second, the omission to exercise ordinary and reasonable care in connection therewith; and, third, injury resulting in consequence thereof. In view of the contractual relation existing between the bank and its depositor, some duty of care may be owing to it. The bank, by the terms of its contract with him, is bound to pay on his account to the holder of paper bearing his genuine signature the amount called for, if such amount is to his credit. But a third person is under no obligation to honor his paper. He can take it or not as he pleases, and as a rule such paper is accepted in reliance upon the immediate transerrer thereof. *Trust Co. of America v. Conklin*, 65 Misc. 1, 119 N.Y. Supp. 367. What duty, therefore, is owing to him? Again, at the risk of being charged with lack of ordinary care and prudence, must one guard against the possibility of a crime being committed? It has been held that where the maker of a completed negotiable instrument has parted with its possession, but it is in such form that it is possible to make alterations in it, he is not guilty of negligence in thus delivering it, for the reason that he is not bound to assume that the person to whom he delivers it will be likely to commit a crime because it is apparently easy to do so. *Nat. Exchange Bank v. Lester*, *supra*. The drawer of a check is not bound so to prepare it that nobody else can successfully tamper with it. *Critten v. Chemical Nat. Bank*, 171 N.Y. 219, 224, 63 N.E. 969, 57 L.R.A. 529. Much less can a party be held liable for negligence because it is possible that he may be deprived of the possession of an incomplete negotiable instrument by a crime. He is not bound to anticipate nor guard against such an act. * * *

We conclude, therefore, that the delivery of a promissory note by the maker is necessary to a valid inception of the contract. The possession of such a note by the payee or indorsee

is *prima facie* evidence of delivery; but if it appear that the note has never been actually delivered, and that without any confidence, or negligence, or fault of the maker, but by force or fraud, it was put in circulation, there can be no recovery upon it, even when in the hands of an innocent holder.

Defendant contends that, as against the plaintiff, the bank was justified in paying out the plaintiff's money on the check, and cites in support of his contention, *Trust Co. of America v. Conklin*, *supra*. If so, it was not because the check was a valid check in the hands of a third person, but because of the peculiar contract relation between the bank and its depositor. We are not called upon to decide this, since it seems to be conceded that, if the check was not a valid obligation in the hands of the defendant, this action will lie as for money had and received.

The judgment appealed from must be reversed, and a new trial ordered; costs to abide the event.

ILLUSTRATIONS

1. Miller signed his name to a blank check and locked the check in his safe. A burglar broke into the safe, stole the check, and filled it in for \$1,000, and negotiated it to Allen, a holder in due course. Miller stopped payment on the check, and Allen sued Miller on the instrument. In this case Miller's defense of nondelivery of an incomplete instrument will succeed against the holder in due course. There is here no negligence on the part of the drawer to estop his real defense, for Miller used care in putting the blank check in a place of security.

2. Suppose in the above facts that Allen had succeeded in getting the drawee bank to pay the check before payment had been stopped. Could Miller compel the bank to recredit his account? No. The mere act of signing the check in blank is itself an act of negligence as to the drawee bank. So Miller is precluded from denying the delivery of the instrument.

5. INCAPACITY

An infant cannot bind himself on any contract; the obligation is voidable at the option of the infant. The fact that the contract is evidenced by a negotiable instrument in the hands of a holder in due course who took without knowledge of the maker's infancy, creates no exception to the rule. The infant maker, acceptor, or indorser may plead his infancy against any holder as a complete defense to liability.

6. ILLEGALITY

Where a statute has declared a particular type of contract illegal, and has gone further and provided that the effect of the illegality shall be to make it absolutely void, such illegality affecting a negotiable instrument is a real defense available against any holder.

Illegality is a real defense, available against even a holder in due course, where the contract is of a type declared void by statute. Thus a usurious note, sued on in a state declaring usurious notes absolutely void, is just as void in the hands of a holder in due course as it was in the hands of the payee who was party to the usurious contract.

But illegality in the consideration for the note, in the absence of any statute declaring such instruments void, is only a personal defense, not available against a holder in due course. So, if M gives P his note in payment of a gambling debt, although the consideration for the note is illegal, the instrument is not void but only voidable; and, if A purchase from P without knowledge of M's defense of illegality, he may recover.

SECTION 2.—ACCEPTANCE

Acceptance of a bill of exchange is an unqualified promise by the drawee to pay to the holder the amount called for by the bill. It thus creates a contract between drawee and holder upon which the latter may sue.

Acceptance may be (1) on the face of the instrument; (2) off the face of the instrument; or (3) implied from the acts of the drawee.

A bill or check may be drawn and delivered by the drawer to the payee, and negotiated by successive holders, all prior to acceptance. It is clear that the drawee cannot be bound on the instrument before he has consented to be bound. Acceptance is such assent. It is the promise by the drawee to pay the amount of the bill to the true owner thereof. Certification of a check by the drawee bank is the most familiar example of an acceptance. Prior to certification, the holder of a check could not sue the drawee bank. After certification, he can, if the bank refuses to pay.

Acceptances are ordinarily written on the face of the instrument itself. In fact, the holder may require this to be done. Section 133 of the act provides: "The holder of a bill presenting the same for acceptance may require that the acceptance be written on the bill, and, if such request is refused, may treat the bill as dishonored." The formal requirements are (1) that the acceptance be in writing; (2) that it be signed by the drawee; and (3) that it clearly indicate the drawee's assent to the order of the drawer. There can be no such thing as an oral acceptance or an acceptance over the telephone. The usual acceptance on the face of the instrument consists of the word "accepted" or "certified," accompanied by the signature of the drawee.

Acceptances external to the instrument are recognized by the Negotiable Instruments Law. Section 134 provides: "Where an acceptance is written on a paper other than the bill itself, it does not bind the acceptor except in favor of a person to whom it is shown and who, on the faith thereof, receives the bill for value." So, if the necessary requisites are complied with, an acceptance may be made by a letter or telegram. These requisites are: (1) A writing signed by the drawee; (2) a clear and unequivocal promise to pay; (3) the bill must have been purchased *in faith on the acceptance*. So one who buys a bill, and later requests and receives the drawee's acceptance contained in a letter, cannot hold the drawee on that acceptance. Since such a collateral acceptance will bind the acceptor only as to persons who on the strength of such a writing take the bill for value, and since under the facts the holder had bought the bill

prior to receiving the acceptance, as to him the acceptor is not bound. But, if the holder later sell the bill to another, showing him the drawee's acceptance, as to such a later holder the acceptor is bound.

Collateral acceptances occur most commonly when a prospective purchaser of a draft telegraphs the drawee bank to inquire whether it will pay the particular draft. If it telegraphs back that it will pay, and in faith on the telegram the purchaser buys the draft, he can hold the drawee bank liable as an acceptor. The courts are strict in holding that such telegrams must be actual promises to pay the draft. A reply merely to the effect that such draft is "good" is held not a promise to pay and so no acceptance.

The third type of acceptance is acceptance implied in law. The drawee is allowed twenty-four hours after presentment in which to decide whether or not he will accept the bill. If, after the expiration of that time, he either destroys, or refuses to accept or return the bill, he will be deemed to have accepted it. Negotiable Instruments Law, § 137. It is to be noted that the statute uses the word "refuse." Consequently a mere retention of the bill by the drawee for more than twenty-four hours will not constitute implied acceptance. The holder must show that he has demanded return of the bill, and that the drawee has refused so to return it.

ILLUSTRATIONS

1. M, in New York, drew a draft to his own order on C, in Chicago, for \$5,000, for meats. M indorsed the draft to N, a New York bank, which purchased the paper and then wired C, asking whether C would accept the draft. C wired: "Draft is good." N sent the draft for payment, which was refused. N sues C, asserting that the telegram is an acceptance. C is not liable, for two of the requisites of an acceptance not on the face of the instrument are not present: First, N did not buy the draft in faith on the acceptance, for it had bought it before the telegram of C was received; and, second, even if N had bought it in faith on the acceptance, the words of C did not constitute a clear promise to pay.

2. G owed J \$150 for goods sold. J drew a bill of exchange on G for \$100, which he delivered to P in payment for goods bought by J from P. P presented this bill for acceptance to G, who retained the instrument for three days and then tendered it back to P, refusing to accept because of other credits owed by J which more than balanced the amount of this bill. J is now insolvent. Has P rights against G as an acceptor? No, for mere retention of the bill for more than twenty-four hours, without a demand and refusal to return, does not amount to acceptance implied in law.

CHAPTER 4

RIGHTS OF THE HOLDERS AGAINST PRIOR INDORSERS

Section

1. Liability of Unqualified Indorser on the Instrument.
 2. Liability of Unqualified Indorser on the Warranties.
 3. Liability of Qualified Indorser and Transferor by Delivery.
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SECTION 1.—LIABILITY OF THE UNQUALIFIED INDORSER ON THE INSTRUMENT

1. IN GENERAL

The drawer of a bill or check and the indorser of any negotiable instrument who indorses without qualification, each contract to pay the instrument if the primary party does not pay, provided (1) there is due presentment, and (2) due notice of dishonor. The liability then is secondary, since it does not accrue until after default by the primary party; and it is conditioned upon performance by the holder of the two necessary acts, presentment and notice. Thus, if either condition is not complied with, the secondary party is discharged.

Unlike the maker of a note or acceptor of a bill, whose obligation is primary, their promise being directly and unconditionally to pay, the drawer of a bill of exchange and the indorser of either a note or bill by signing the instrument promise *conditionally* that, if the primary party (maker or acceptor) does not pay, then they will pay, provided the holder makes due presentment and gives due notice of dishonor. In other words, the holder has rights against any and all persons who place their signatures on a negotiable instrument, even though the nature of such rights be different. Stated conversely, all signers undertake obligations running to the holder to pay. The primary parties undertake absolute obligations; the secondary parties undertake conditional obligations. The problem is the nature of these conditions, due presentment, and notice of dishonor.

Due presentment of instruments payable at a day certain is on that day. The holder or his agent must exhibit the instrument to the primary party (if a note, to the maker; if a bill, to the drawee or acceptor) and demand payment. When the day of maturity falls upon Sunday or a holiday, the presentment may be made on the next succeeding business day. Instruments falling due on Saturday are to be presented for payment on the next succeeding business day. Negotiable Instruments Law, § 85.

A refusal to pay is called a dishonor; and the holder must then give due notice of such dishonor to all secondary parties, or they will be discharged from their liability on the instrument. If these necessary steps are taken, the holder has preserved the liability of all parties to the instrument, and he may join all as defendants in the same suit and take judgment against each one. Of course, satisfaction of judgment by any one operates as a satisfaction of all.

2. DUE PRESENTMENT OF DEMAND NOTES AND BILLS OF EXCHANGE

Negotiable Instruments Law, § 71. Where the instrument is payable on demand, presentment must be made within a reasonable time after its issue, except that in the case of a bill of exchange, presentment for payment will be sufficient if made within a reasonable time after the last negotiation thereof. Thus, due presentment of demand notes is a reasonable time after issue; whereas due presentment of demand bills is a reasonable time after the last negotiation.

On notes, there is only one class of secondary parties—indorsers. To preserve their liability where the note is payable on demand, presentment must be made a reasonable time after issue. In determining what is a reasonable time, the circumstances of the particular case and the usage of business in the particular locality are to be considered. One such circumstance is whether the note bears interest. An interest-bearing note is deemed to have been intended to have a longer life than a non-interest-bearing one.

There are two secondary parties on bills of exchange, the drawer and the indorser. A different rule is imposed as to them. Due

presentment of bills of exchange is a reasonable time after the last negotiation. This makes it possible to revive the liability of secondary parties on bills. For example, suppose a demand bill drawn by M to P's order, on D, indorsed by P to A, is kept by A for three or four years without presentment to D. If A now presents to D for payment, and D dishonors, A could not hold M and P on the instrument. They are discharged by the failure to meet the condition to their liability—due presentment. However, suppose A now negotiates to B and B makes presentment within a reasonable time from the date he bought the bill. If D dishonors, B can hold M and P. As to B there was due presentment, since presentment was made within a reasonable time after the last negotiation.

3. DUE PRESENTMENT OF CHECKS

Negotiable Instruments Law, § 185. "A check is a bill of exchange drawn on a bank payable on demand. Except as herein otherwise provided, the provisions of this act applicable to a demand bill of exchange apply to a check."

Negotiable Instruments Law, § 186. "A check must be presented for payment within a reasonable time after its issue, or the drawer will be discharged from liability thereon to the extent of the loss caused by the delay."

It will be observed from the above-quoted sections of the Negotiable Instruments Law that a special case is made of the drawer of a check. Unlike the drawer of a bill or the indorser either of a bill or check (to whom due presentment is a reasonable time after the last negotiation), due presentment to charge the drawer of a check is made a reasonable time after issue. In addition, the effect of failure to make due presentment is different. Instead of being discharged entirely as is the case of all other secondary parties where the condition is not met, the drawer of a check is only discharged to the *extent of the loss caused by the delay*. Thus in effect the only case in which the drawer of a check will be discharged because of failure to make due presentment is where the drawee bank fails.

COLUMBIAN BANKING CO. v. BOWEN.

Supreme Court of Wisconsin, 1908. 134 Wis. 218, 114 N.W. 451.

Action by the Columbian Banking Company against John Bowen. From a judgment for plaintiff, defendant appeals.

June 10, 1903, the banking firm known as the Farmers' & Merchants' Bank, of Bangor, Wis., sold to the defendant a \$400 draft, drawn in the usual form, dated on that day, payable to defendant's order, and drawn by such firm on the National Bank of North America, at Chicago, Ill. The draft was sent to the defendant at Barron, Wis., and was indorsed by him to A. R. Tabbert, to whom it was forwarded by mail, at Spokane, Wash., June 16, 1903, and was there received by him June 20th thereafter. He was at Spokane temporarily and was on his way to the city of San Francisco, Cal. July 14, 1903, he indorsed the draft and sold the same to the plaintiff at such city, receiving \$400 therefor. On that day, in due course, plaintiff sent the draft by mail to the Bankers' National Bank, of Chicago, Ill., by which it was received July 18th thereafter, and was then, as requested, duly presented to the drawee for payment, which was refused, whereupon it was duly protested for nonpayment by a duly authorized notary public, who forwarded a manifest thereof with notices of protest for A. R. Tabbert, the plaintiff and the defendant, to the plaintiff at San Francisco, Cal., and also sent due notice to the National Bank of North America at Chicago, Ill., and to the drawer at Bangor, Wis., July 19, 1903. Plaintiff upon receipt of the manifest and notices duly sent the one for defendant to him at Barron, Wis., by whom it was duly received, and sent the one for Tabbert by mail to his post-office address and reputed place of residence, that being San Francisco, Cal. Thereafter due demand was made on defendant for payment of the draft, and the same was refused. * * * Plaintiff was the owner of the draft at the time of the commencement of the action, and at the time of the trial thereof there was due thereon \$210.

MARSHALL, J. (after stating the facts as above). Counsel for appellant have presented quite an extended argument, referring to many authorities, as to the law antedating and independently of the negotiable instrument statute * * * to support the proposition, that appellant was released from liability on the in-

strument in question, because of the period intervening between his parting therewith and the presentation thereof to the drawee for payment. * * *

Applying the law as aforesaid to the facts of this case it is readily seen that the delay in presenting the paper for payment between its date and the negotiation to the bank at San Francisco is immaterial. Appellant unqualifiedly indorsed the paper and put it in circulation by sending it to Tabbert at a distant part of the country, probably knowing that he was a traveler. Tabbert received the paper while journeying with the intention of going to San Francisco and held it till he arrived there and then negotiated it. It was promptly presented for payment thereafter and so in time, as regards that circumstance, to preserve the liability of appellant.

The court decided, as indicated, that Tabbert was a traveler with San Francisco as his destination and properly held that such circumstance sufficiently explained, if any explanation were necessary, the lapse of time between his reception of the paper and his negotiation thereof, preserving its circulating character and warranting the finding that the respondent came thereby in due course.

The point is made that the instrument was not presented to the drawee for payment during banking hours. The negotiable instrument law at section 72 provides that "Presentation for payment to be sufficient, must be made: * * * at a reasonable hour on a business day. * * *" The evidence shows that the paper, after taking its course through the clearing house, was presented to the drawee for payment on the afternoon of the same day between the hours of 3 and 6 o'clock. The proof is to the effect that such was the customary way of doing such business in Chicago, where the drawee was located. That is, as we understand it, that the business day of the bank continued after the closing of the clearing house transactions so as to enable banks holding paper for collection, refused recognition in such transactions, to be presented for payment as was done in this case. That satisfies the statute. What constitutes business hours of a bank, within the meaning of the statute, has reference to the general custom at the place of the particular transaction in question. In case of a transaction occurring in a foreign jurisdiction,

as in the instance in question, the court cannot take judicial notice of what constitutes reasonable hours on a business day. * * * It is a matter of proof, though in case of the notarial certificate of the transaction, as here, being regular so as to furnish *prima facie* proof that the paper was duly presented for payment, that raises the presumption that the presentment was made at a proper time. * * *

Judgment affirmed.

GORDON v. LEVINE.

Supreme Judicial Court of Massachusetts, 1907.
194 Mass. 418, 80 N.E. 505, 10 L.R.A.,N.S., 1153, 120 Am.St.Rep. 565,
10 Ann.Cas. 1119.

MORTON, J. This is an action upon a check by the plaintiff as payee against the defendant as drawer. The check was dated December 30, 1905, though there was some question whether it was actually drawn and delivered on that day, or the 31st. The plaintiff is described in the writ as of Chelsea and the defendant as of Boston. The bank on which the check was drawn was in Boston and the check was drawn and delivered there. The plaintiff testified that the defendant asked him not to present the check for a couple of days as he did not have sufficient funds to meet it; * * * that in the afternoon of the same day he passed the check to one Saievitz in payment of a bill which he owed him receiving the balance in cash. And there was testimony tending to show that on the next day Saievitz indorsed it to one Rootstein who deposited it on January 4th, in the Faneuil Hall National Bank, Boston, for collection, and that that bank's messenger went with it on the afternoon of the following day, Friday, January 5th, to the bank on which it was drawn, the Provident Securities & Banking Company, and found its doors closed. The plaintiff also testified that he told the defendant the bank had failed and that the defendant promised to make the check good. * * *

The defendant, in substance, asked the court to instruct the jury that a check must be presented for payment in a reasonable time and that in order to have been presented within a reasonable time the check in suit should have been presented before the close of banking hours on Monday; that its transfer to successive hold-

ers would not extend the time for presentment, and a presentment on January 5th would not be within a reasonable time and if the bank failed in the meantime and the defendant sustained a loss in consequence of delay in presenting the check, he would be discharged from liability to that extent. The judge gave in part the instruction thus requested, and refused it in part. He instructed the jury that the check must have been presented for payment within a reasonable time, and that if it was presented on Monday that would be within a reasonable time. But he refused to instruct the jury that the transfer to successive holders would not extend the time, or that a presentment on Friday was not within a reasonable time. * * *

The general rule is as was stated by the court and as is provided in the Negotiable Instruments Act * * * that a check must be presented for payment within a reasonable time after it is issued. If it is not so presented and the drawer sustains a loss by reason of the failure of the drawee he will be discharged from liability to the extent of such loss, continuing liable otherwise. This results from the nature of the instrument, which, though defined in the Negotiable Instruments Act * * * as "a bill of exchange drawn on a bank payable on demand," is intended for immediate use * * * and not to circulate as a promissory note, and it consequently would be unjust to subject the drawer to the loss, if any, resulting from failure to present it for payment within a reasonable time. What is a reasonable time, however, still remains for consideration. The Negotiable Instruments Act provides generally * * * as the court said that "in determining what is a 'reasonable time' or an 'unreasonable time' regard is to be had to the nature of the instrument, the usage of trade or business, if any, with respect to such instruments and the facts of the particular case." This, however, would not seem to lay down or to establish any new rule. The nature of the instrument and the facts of the particular case have always been considered in the passing upon the question of reasonable or unreasonable time. In deciding, therefore, whether this check was presented within a reasonable time, if presented on Friday, resort must be had to the rules which have been hitherto established in similar cases. And one of the rules which have been established is that where the drawer and drawee and the payer are all in the same city or town a check to be presented

within a reasonable time should be presented at some time before the close of banking hours on the day after it is issued and that its circulation from hand to hand will not extend the time of presentment to the detriment of the drawer. If it is presented and paid afterwards the drawer suffers no harm. But if not presented within the time thus fixed, and there is a loss it falls not on him but on the holder. * * * It follows from what has been said that the exceptions must be sustained. * * *

ILLUSTRATIONS

1. H is the holder of a 60-day bill of exchange on which P, A, and B are indorsers. The date of maturity fell on a Saturday. H presented for payment to the drawee on the Monday following date of maturity. The drawee dishonored, and H notified all parties. H can hold the drawer and P, A and B, indorser. There was due presentment, since Negotiable Instruments Law, § 85, provides that instruments falling due on a Saturday are to be presented for payment on the next succeeding business day.

2. Marx made a demand note to Parker's order dated February 1, 1924. Parker indorsed it to Allen, who held the note until February 1, 1927. Allen then presented for payment to Marx, who failed to pay. Allen notified Parker of dishonor, and subsequently sued both Marx and Parker. Allen is entitled to judgment against Marx. The liability of the maker of a note is absolute. Allen is not entitled to judgment against Parker. As an indorser, Parker's liability is conditioned on due presentment, and here presentment was not until three years after issue, an unreasonable time.

3. M in St. Louis on March 1st drew a check on the D Bank in Chicago for \$100, payable to the order of P, and delivered the same to P for value in St. Louis, on the day of execution. P negotiated to A in St. Louis on March 2d. A negotiated to B and mailed the check to B in Cincinnati. B received the check March 4th. On March 6th B negotiated and mailed the check to the E Bank in Chicago. The check was received by E on March 7th and on that day presented to the D Bank for payment, but dishonored because of the insolvency of the drawee; a receiver having been appointed on March 5th. The drawer had sufficient funds on

deposit to meet the check, had it been presented before the appointment of the receiver. The drawee paid depositors 50 per cent. The drawer is discharged on the instrument to the extent of the loss caused by the delay, here 50 per cent. of the amount of the check. Seven days between issuance and presentment was not here a reasonable time. The liability of the indorsers was here revived by the presentment of the check within twenty-four hours after the last negotiation.

4. NOTICE OF DISHONOR AND PROTEST

Negotiable Instruments Law, § 89. "When a negotiable instrument has been dishonored by non-acceptance or non-payment, notice of dishonor must be given to the drawer and to each indorser and any drawer or indorser to whom such notice is not given is discharged."

Notice may be oral or written. It must sufficiently describe the instrument to identify it. If in writing, the notice may be sent through the mails, and its loss before delivery does not affect the fact that notice has been given, provided it was properly addressed and mailed.

The time within which notice of dishonor must be given is specifically provided in the Negotiable Instruments Law, §§ 103, 104. If the person giving and the person to receive notice reside in the same place, notice must be given not later than the next business day following the dishonor. If they reside in different places, and the notice is sent by mail, it must be deposited in the post office in time to go by mail the day following the date of dishonor.

Protest is formal notice of dishonor. It consists of a statement, sworn to before a notary public, of the fact of presentment and dishonor. It is essential only in the case of foreign bills of exchange appearing as such on their face.

The second condition to the liability of any secondary party on a negotiable instrument is that notice of dishonor be given to him. Lack of due notice will discharge him from liability. It is therefore most important for the holder to take this important step where an instrument is refused by the primary party in order to perfect his rights also against the secondary parties.

No formal requirements are made for the notice. It may be oral or in writing. The holder may call up the indorser on the

telephone and inform him in that way of the dishonor. In any case, whether oral or written, the notice should contain a sufficient description of the dishonored instrument so that it can be identified from the notice. However, lack of such description will not invalidate the notice unless the party receiving notice is actually misled. In any case where such party has only indorsed one instrument, he could not be so misled.

If the notice is properly addressed and deposited in the mails, the fact that it is never delivered will not affect the holder's rights.

The time within which notice of dishonor must be given is in general within twenty-four hours of the time of dishonor; that is, the next business day. If maturity of the instrument falls on a day followed by a holiday, and the parties reside in the same town, notice must be given the next business day. Where the person giving and the person to receive notice live in different towns, the notice must be placed in the mails in time to go by mail the day following the day of dishonor.

Protest is formal notice of dishonor, and has the same general purpose of informing parties secondarily liable that there has been a dishonor of the instrument. It is general practice for parties to make protest rather than to give the informal notice of dishonor. The reason is that, where a bill or note is formally protested, the notice of protest under the hand and seal of a notary gives to the holder a record and evidence of the fact on which his right against secondary parties depends. In any case in which notice of dishonor must be given, protest may be made instead. The only instruments which must be protested are foreign bills of exchange appearing as such on their face. A foreign bill of exchange is one which purports to be drawn in one state and payable in another.

SECTION 2.—LIABILITY OF UNQUALIFIED INDORSER ON THE WARRANTIES

In addition to the conditional liability on the instrument arising out of the contract of indorsement, the unqualified indorser under-

takes an unconditional liability off the instrument on certain implied warranties. Negotiable Instruments Law, § 66, provides:

"The indorser without qualification warrants to all subsequent holders in due course:

- "(1) That the instrument is genuine and what it purports to be;
- "(2) That he has good title to it;
- "(3) That all prior parties had capacity to contract;
- "(4) That the instrument is valid."

Indorsers without qualification are those who indorse either in blank, specially, or conditionally. Such indorsers undertake two liabilities. One is to pay the amount of the instrument to the holder if the primary party for any reason fails to pay. It will be observed that this liability is on the instrument itself.

The other is a liability off the instrument on the implied warranties. If any of the things warranted against occur, the indorser must make good to the holder the amount he has been damaged thereby. For example, if the maker's name has been forged on the note, the indorser is liable on his warranty that "the instrument is genuine." If the instrument has been materially altered, the first warranty, that "it is what it on its face purports to be," is breached. If there has been a forged indorsement, so that the indorser has no title to the instrument, his warranty that he had title is breached. If for illegality the instrument is void so that the holder cannot recover against the maker, he may yet recover against the indorser for breach of the warranty that "the instrument is valid."

It is thus apparent that, if the primary party on a bill or note fails to pay the holder at maturity, such holder may (1) collect from the unqualified indorsers on the instrument by showing due presentment and due notice of dishonor given to them; or, if such indorsers have been discharged by his failing so to proceed, he may nevertheless hold them on their unconditional liability off the instrument in any case where he can show that a real defense to such instrument existed.

WACHOVIA BANK & TRUST CO. v. CRAFTON.

Supreme Court of North Carolina, 1921.
181 N.C. 404, 107 S.E. 316, 16 A.L.R. 1375.

The action is brought by an indorsee and holder in due course of a promissory note given by one J. M. Carver to J. W. Crafton, defendant, for money won by defendant in a game of cards, and indorsed by the defendant, the payee of the note in due course and for value to plaintiff bank. There was denial of liability, the defendant, the indorser, alleging that the note in question was for an amount won in a gambling transaction.

HOKE, J. Our statutes applicable to the note in question, C. S. § 2142, renders this and all notes and contracts in like cases void, and it is urged in support of his honor's ruling that, this being true, no action thereon can be sustained. The position as stated is undoubtedly the law in this jurisdiction, and is in accord with well-considered authorities elsewhere. [Citations omitted.]

This principle, however, is allowed to prevail only where the action is on the note to enforce its obligations, and does not affect or extend to suits by an innocent indorsee for value and holder in due course against the indorser on his contract of indorsement. It is very generally held, uniformly, as far as examined, that this contract of indorsement is a substantive contract, separable and independent of the instrument on which it appears, and where it has been made without qualification, and for value, it guarantees to a holder in due course, among other things, that the instrument, at the time of the indorsement, is a valid and subsisting obligation. * * *

And in Norton on Bills and Notes, it is said that—

"Every indorser who indorses without qualification warrants to his indorsee and to all subsequent holders," among other things, "that the bill or note is a valid and subsisting obligation."

In applying these principles, the cases hold that, on breach of the contract of indorsement, a recovery by a holder in due course will be sustained against the indorser, though the instrument is rendered void by the statute law. * * *

Reversed.

ILLUSTRATION

1. A was the holder of five notes, all apparently signed by M, made out to P's order, and indorsed by P in blank. Date of maturity on all the notes was the same, February 1, 1930. A indorsed specially the five notes to H before maturity. February 2, 1930, H presented the five notes to M for payment and M dishonored. H notified P and A of the dishonor and demanded payment. It appeared that on the first note M's name had been forged. The second note had been raised from \$50 to \$500. The third note was void for illegality; a usurious rate of interest having been charged. The fourth note had been signed by M. in blank, stolen from him and filled out, and then sold to P. The fifth note had been induced by P's false statements as to the consideration.

H has discharged P and A from their liability on the contract of indorsement, since H failed to meet the condition of making due presentment. Both P and A are, however, liable to H for the amount of the first four notes, since as to each note there was a breach of warranty. On the first note the warranty of genuineness was breached, since it was a forgery. On the second note, the warranty was that it was what it purported to be, whereas there had been a material alteration. On the third and fourth notes, the warranty that they were valid obligations was breached, since one was an incomplete instrument undelivered and the other was void for illegality.

On the fifth note H cannot hold P or A, since they were discharged on the instrument and since no warranty as to this note was breached.

SECTION 3.—LIABILITY OF THE QUALIFIED INDORSER AND TRANSFEROR BY DELIVERY

Negotiable Instruments Law, § 65, provides:

“Every person negotiating an instrument by delivery or by a qualified indorsement, warrants—

- "(1) That the instrument is genuine and what it purports to be;
- "(2) That he has good title to it;
- "(3) That all prior parties had capacity to contract;
- "(4) That he has no knowledge of any fact which would impair the validity of the instrument or render it valueless.

"But when the negotiation is by delivery only, the warranty extends in favor of no holder other than the immediate transferee."

The qualified indorser and the transferor by delivery undertake no liability on the instrument whatever. Nevertheless, they warrant the same things as does the unqualified indorser, with the exception of the fourth warranty. As to this, they warrant merely that, *so far as they know*, the instrument is a valid obligation.

Although the indorser "without recourse" and the transferor by delivery warrant the same things, yet there is one important difference made between them. The transferor's warranties run only to his immediate transferee, whereas the qualified indorser's warranties run to all subsequent holders of the instrument.

LITTAUER v. GOLDMAN.

Court of Appeals of New York, 1878. 72 N.Y. 506, 28 Am.Rep. 171.

Appeal from judgment of the General Term of the Supreme Court in the First Judicial Department, entered upon an order affirming an order of Special Term, which overruled a demurrer to the complaint herein. Reported below, 9 Hun 231.

The complaint alleged, in substance, that defendant sold and transferred by delivery to plaintiff, for valuable consideration, a promissory note, which was void for usury in its inception; that plaintiff sued the makers, who interposed the defense of usury; that plaintiff notified defendant of the bringing of the action and of the defense set up, and requested him to take charge of the prosecution of said action, and that he would be held liable in case the defense was sustained; that plaintiff was beaten in said action and a judgment for costs rendered against him. It was not alleged that defendant had knowledge of the defect, or that any express representation or guaranty was made. The defendant

demurred that the complaint did not state facts sufficient to constitute a cause of action.

MILLER, J. The right of the plaintiff to maintain this action rests upon the ground that the note in question, which was sold and transferred by the defendant to the plaintiff, was invalid and void, by reason of its original usurious consideration. It is alleged that, being in violation of the statute against usury, it was no note, and by implication of law the defendant did warrant and undertake that the same was not usurious or illegal, but a valid and legal note. The complaint does not allege that the defendant had any knowledge of the usury or was a party to the same, but states that the seller by the act of transfer for a valuable consideration, impliedly warranted that the paper was genuine and all that it purports to be upon its face, and incurred an obligation by the sale to make the paper good, although he did not indorse or guarantee the same. The question whether an action will lie for the loss sustained by the plaintiff by reason of the note being usurious, and the recovery of the amount thereof thereby defeated, has never arisen under the precise circumstances presented in this case, and demands an examination of the principle applicable to the contract entered into upon the sale of paper of this description, and of the authorities bearing upon the subject.

The rule is well settled that generally one who transfers paper by delivery only incurs none of the liabilities which attach to an indorser, for the reason that the irresistible inference is that if he transfers it, and it is received without his indorsement, that such liabilities did not enter into the bargain or the intention of the parties. This rule, however, is not without exception, and the transerror of notes or bills by delivery warrants the genuineness of the signatures, and that the title is what it purports to be. If the paper is forged, the transferee is liable upon the original consideration, which has never been extinguished by the sale. 2 Parsons on Contracts, 37, 38. So, also, it is laid down by the same author that the vendor without indorsement warrants that the paper is of the kind and description that it purports to be, and there is an implied warranty that the parties to the paper are under no incapacity to contract, as from infancy or marriage or other disability, and the assignment of a bill or note for a valuable consideration raises an implied warranty that the assignor has done nothing, and will do nothing, to prevent the assignee

from collecting it. The reason given as to forged paper is that it is nothing, and the one who has transferred it has transferred nothing, and is therefore liable. *Id.* 39, 40.

The question whether paper tainted with usury, which is transferred by the holder without knowledge of this defect, can be regarded as within the principle of the exceptions stated, is not free from difficulty, and at first view there appears to be some ground for claiming that a note made in violation of a statute which declares usury to be a misdemeanor, and that all paper of this kind shall be void, should stand on the same footing as forged or other paper, which is excepted from the general rule. Although the reported cases do not decide the exact point, an examination of some of the leading authorities tends to throw some light on the subject. * * *

In Chitty on Bills, p. 245, it is laid down that where a person obtains money on a note, and it turns out to be forged, he is liable to refund the money to the party from whom he received it, on the ground that there is, in general, an implied warranty that the instrument is genuine. Again, at page 247, it is said: "If a man assign a bill for any sufficient consideration, knowing it to be of no value, and the assignee be not aware of the fact, the former would in all cases be compellable to repay the money he had received." It is knowledge of the defect which renders the party liable for a note which is of no value, and this rule applies to a note which is tainted with usury. * * * There is no precedent and not a single reported case in the books in favor of the doctrine that where a promissory note is infected with usury, and that fact is unknown to the party who transferred it, that is an implied warranty of the validity of the note. To uphold such a doctrine would be an innovation upon a settled principle of law and the establishing of a new and different rule from that which has governed the sale and transfer of this species of property for a long period of time. * * *

The result is that the judgment was wrong and must be reversed, with leave to the plaintiff to amend his complaint upon the usual terms in such cases. All concur, except EARL, J., dissenting.

Judgment accordingly.

ILLUSTRATIONS

1. Johnson bought bearer bonds issued by the city of Scranton. Johnson sold and delivered his bonds to Hallock. It later appeared that the bonds were void, because at the time of issue the city had already exceeded its debt limitation under the state law, but Johnson did not know this. Hallock has no rights against Johnson. Johnson, as a transferor by delivery of bearer paper, warranted to his immediate vendee four things: Genuineness, title, capacity, and his own good faith as to whether these bonds were valid obligations. So far as was shown, none of these warranties was breached, since it did not appear that Johnson knew the bonds were void at the time he transferred them.

2. M's name was forged to a note made to the order of P. P indorsed, "P Without recourse," to A, who transferred by delivery to B. B sold the note without indorsement to H. (1) H has no rights against M, since his name was forged. (2) H may hold P for breach of the first warranty, that the instrument is genuine. (3) H has no rights against A, since the warranties of the transferor by delivery extend only to the immediate transferee. (4) H may hold B, his transferor, for breach of the first warranty.

CHAPTER 5

DISCHARGE

Section

1. Discharge of the Instrument.
 2. Discharge of Particular Parties.
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SECTION 1.—DISCHARGE OF THE INSTRUMENT

Negotiable Instruments Law, § 119. A negotiable instrument is discharged:

- (1) By payment in due course by or on behalf of the principal debtor.
- (2) By the intentional cancellation thereof by the holder.
- (3) By any act which will discharge a simple contract for the payment of money.
- (4) When the principal debtor becomes the holder of the instrument at or after maturity in his own right.

Payment in due course is payment at or after maturity of the instrument. Payment before maturity does not discharge the instrument; it is only a personal defense not available against a holder in due course. Suppose that M, the maker of a negotiable note, pays the amount of the note to the holder before maturity, but fails to take up the instrument, and the holder thereafter and before maturity negotiates to H, who without knowledge of the prior payment by M pays value. H is a holder in due course; he can enforce the instrument and compel M to pay it again to him, for M's defense of payment before maturity is a personal defense. But suppose M pays this note at maturity and fails to take it up. The holder then sells to H, who without knowledge of the prior payment gives value for it. H cannot be a holder in due course, since he took after maturity. When H sues M, the defense of payment is available. Thus payment at or after matur-

ity operates as a defense available against any one and as a consequent discharge of the instrument, since thereafter there can be no holders in due course.

Cancellation by the holder is another method by which an instrument may be discharged. Cancellation is the normal method of evidencing the fact of discharge. For example, if the maker of a note pays it and takes it up before maturity, he should cancel it or destroy it in order that it may not in some way again get into circulation and be negotiated to a holder in due course without notice of the previous discharge by payment. Stamping the face of the note with the word "Paid" or "Cancelled" is the usual mode of cancellation. To be operative as a discharge, the cancellation must be done by the holder, and it must be done by him intentionally. Accidental cancellation or destruction of the instrument does not discharge it as an obligation. The holder may thereafter sue on the note as a lost or destroyed instrument.

The third method of discharge, any act which will discharge a simple contract for the payment of money, seems simply to be a mistake in the statute. Take, for example, the modes of discharge other than performance, such as release, rescission, accord and satisfaction, or novation. Any one will operate as a discharge of the maker as between the parties, but not one is operative against a holder in due course. For example, suppose C the holder of a note releases M the maker from all liability (the release being by separate instrument), and suppose that thereafter C negotiates the instrument to a holder in due course. The release is an act which would discharge a simple contract claim; yet it clearly does not discharge the note, for the holder in due course can hold M liable on the note free from M's defense of release. The provision of the statute is a mistake which should be eliminated.

The final method of discharge is when the party primarily liable becomes the holder of the instrument at or after maturity. A purchase of a note by the maker, or of a bill by the acceptor, at or after maturity, thus becomes conclusively a payment rather than a purchase; and the instrument is thereby discharged.

SECTION 2.—DISCHARGE OF PARTICULAR PARTIES

Negotiable Instruments Law, § 120. "A person secondarily liable on the instrument is discharged:

- "1. By any act which discharges the instrument;
- "2. By the intentional cancellation of his signature by the holder;
- "3. By the discharge of a prior party;
- "4. By a valid tender of payment made by a prior party;
- "5. By a release of the principal debtor, unless the holder's right of recourse against the party secondarily liable is expressly reserved;
- "6. By any agreement binding upon the holder to extend the time of payment, unless made with the assent of the party secondarily liable, or unless the right of recourse against such party is expressly reserved."

The discharge of the instrument must be distinguished from the discharge of a party to the instrument. One party may be discharged, yet the holder may retain his rights against all the other parties. Whereas the discharge of the instrument discharges all parties thereto.

If the holder of the instrument cancels the signature of a secondary party, as by drawing a line through such signature, this operates as a discharge of that party. It also operates incidentally as a discharge of all secondary parties *subsequent* to the one discharged, since their rights against the prior party are affected without their consent. So if H, the holder of a note on which A, B, C, and D are indorsers, cancels B's signature, he thereby discharges not only B, but also C and D. For, if C or D were called upon to pay the instrument, their right of recourse against the prior indorser, B, would be gone.

A tender of payment of the instrument made by a secondary party, refused by the holder, discharges all parties subsequent to the one making the tender. The reason is that each party is in a sense surety for payment by the parties prior to him, and, if the holder has in his control the means of payment from a prior

party, it is unfair to such sureties that he refuse to avail himself of it and so discharge them.

For the same reason that cancellation operates as discharge of all subsequent parties, a release by the holder of one party also discharges the subsequent indorsers. Their rights against the indorser released are materially affected by action of the holder without their assent; therefore they are discharged.

A binding extension of time between the holder and the principal debtor discharges all secondary parties unless they assent, or unless the holder reserves his rights against them. Here also the rights of such secondary parties—to pay at the fixed maturity and proceed against the primary party—are changed, for now they must wait until the extended maturity date. If they have assented to such change, they cannot complain; if not, their right of recourse being postponed, they are discharged.

The reason for discharge of subsequent parties by release or extension of time, since it depends upon deprivation or postponement of the right of recourse, does not exist where there is a reservation of right. In such case the release or extension of time is binding only upon the holder alone, operating merely as his promise not to sue. Therefore the indorsers are not discharged. They may pay the instrument to the holder and proceed against the party released, since such release binds only the holder. Similarly, in the extension of time situation, any indorser may pay the instrument at the original maturity date, and proceed immediately against the maker, since the extension with reservation of right postpones no one's right to sue except that of the holder.

ILLUSTRATIONS

1. H, the holder of a bill on which appeared D's acceptance, accidentally tore the bill in two. He pasted it together and sold it to X, who presented it to D for payment. X refuses payment on the ground that the bill was discharged by cancellation. This is not a defense. Cancellation, to operate as discharge of the instrument, must be intentional. Accidental cancellation does not affect the validity of the instrument as an existing obligation.

2. M owed P \$1,000, evidenced by a negotiable note due January 2, 1930. In December of 1929 M paid P the amount owed and P mailed to M a receipt acknowledging payment and releas-

ing M from the debt. Thereafter P sold the note to A on December 20, 1929. On January 2d A presented the note to M, and then learned for the first time that M had already paid the note to P. M is not discharged by that payment. Only payment *in due course* discharges the instrument and the parties thereto. Payment *in due course* is payment to the holder *at or after maturity*. Here the payment was before maturity, and consequently is a defense available only between the parties thereto or their assigns. A is a holder *in due course* and takes free from this defense.

3. M delivered his note to P, who indorsed in blank and delivered to A. The note was due January 2, 1931. In July of 1930 A bought a car from M, and in payment therefor delivered to M this note. August 1, 1930, the note was stolen from M and sold by the thief to H, who took in good faith and without knowledge of any of the above facts. At maturity H sued M, who defended on the ground that the instrument was discharged as soon as the primary party on it became the holder. The defense is not good. An instrument is discharged when the party primarily liable thereon becomes the holder *at or after maturity*. But here M became owner *before* maturity. H can recover from M, as a holder *in due course*.

4. A, B, C and D were successive indorsers of a note held by H. H intentionally discharged B from his contract of indorsement by running a line through B's signature on the note. Not only B, but also C and D, are discharged by H's act. Since C and D have been deprived of their right of recourse against B by A's act in discharging B, they also are discharged.

5. M borrowed \$5,000 from P and gave his note and a mortgage on Blackacre as security for the loan. Thereafter M sold Blackacre to A, who agreed with M that he (A) would pay the mortgage debt. At maturity A went to P, and for a cash payment induced P to agree to extend the time of payment of the mortgage debt for a year. P knew of A's assumption agreement. At the end of the year P sued M on the debt. M is discharged. By the assumption agreement, A became principal debtor and M a surety. A binding extension of time between creditor and principal debtor without the consent of the surety discharges the surety since it prejudices his rights. Hence M is discharged.

6. Had P, in his agreement with A, informed A that P was reserving his rights against M, then M would remain liable, as in that case the effect of the extension would be merely to postpone P's personal right to sue on the debt, leaving the original maturity of the debt unaffected? So M could have paid at maturity and immediately proceeded against A on his assumption agreement. Thus, where M, the surety, is not prejudiced, he is not discharged.

S. & D., ENG. & ARCH. 3RD ED.

WORKMEN'S COMPENSATION

Chapter

1. Employer's Liability to Pay Compensation.
 2. Amount of Compensation Payable.
 3. Liability of Owner, Contractor, and Subcontractor to Pay Compensation.
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CHAPTER 1

EMPLOYER'S LIABILITY TO PAY COMPENSATION

Section

1. In General.
 2. Administration.
 3. Who Comes under the Act.
 4. The Injury Must be Accidental.
 5. The Injury Must Arise out of and in the Course of the Employment.
 6. Notice of the Accident and Claim for Compensation.
-

SECTION 1.—IN GENERAL

Practically all states have passed workmen's compensation statutes. Under this law, the employer is bound to pay a stated amount of compensation for any injury suffered by an employee in the employment, irrespective of whether the injury was or was not occasioned by the employer's negligence, and irrespective of the common-law defenses of contributory negligence, assumption of risk, and fellow servant rule.

In broad outline, Workmen's Compensation Acts impose liability upon the employer to pay compensation for disability or death of the employee resulting from accidental personal injury

arising out of and in the course of the employment, without regard to fault or negligence as a cause. The language of a typical compensation statute in this regard is as follows:

"Be it enacted * * * that an employer in this state, who comes within the provisions of this act, must provide and pay compensation as stated herein, for accidental injuries sustained by any employee arising out of and in the course of the employment. * * *"

The conditions precedent to the employer's liability are then: (1) The employer and employee must both be under the act; (2) the relation of employer and employee must exist; (3) the injury must be accidental; and (4) the injury must arise out of and in the course of the employment.

The acts of the various states vary as to detail and manner of operation; but they are similar as to basic principles involved. Those above mentioned seem to be the storm centers out of which the greater portion of litigation under Workmen's Compensation Acts have arisen; and upon the construction given them by the courts depends an understanding of the operation of compensation law. It is obvious that on any detailed question the text of the act of the particular state and the decisions of its courts should be consulted.

SECTION 2.—ADMINISTRATION

Workmen's Compensation Law is administered by means of state commissions which act as fact-finding bodies to determine whether a claimant is entitled to compensation. In each case the commission enters an award, either granting or denying compensation with the reason therefor. An appeal lies to the courts from the decision of the commission.

A workmen's compensation law has as one of its essential purposes the establishment of a new method of procedure, whereby the long delays and high costs of recovery that obtained under the common-law system might be obviated. It was

therefore necessary to create administrative bodies having jurisdiction over the operation of the compensation statutes. The administrative process of the compensation laws is one of their outstanding features. The method adopted in the statutes of nearly all of the states is the establishment of a Compensation Commission as a quasi judicial body empowered to decide all disputed questions of law and fact which arise between employer and employee in regard to such matters as are covered by the act.

The procedure before the Commission is most informal. The injured employee, who is denied compensation by his employer, may go in person to the offices of the Industrial Commission, where he may himself file his claim for compensation. Thereupon an immediate date for a hearing is set by the Commission and a notice thereof mailed to the employer. At the day and hour set the parties may appear, either in person or by counsel, and introduce evidence in their behalf. The proceedings are conducted with the utmost informality, there being but little similarity to judicial procedure. Action on any compensation claim may be secured with little or no delay, and at very small expense. Appeals may be taken from the decisions of the Commission to the courts.

SECTION 3.—WHO COMES UNDER THE ACT

(1) IN GENERAL

All employers and employees engaged in enterprises or businesses declared by the statute to be hazardous are automatically under the Act whether they wish to be or not. The Illinois act (as a typical statute) provides:

"Sec. 3. The Provisions of this act * * * shall apply automatically and without election to the state, county, city, town, township, incorporated village or school district, * * * or municipal corporation, and to all employers and all their employees engaged in any department of the following enterprises * * * which are declared to be extra hazardous, namely:"

- (1) All construction, including repair, remodeling, removing, demolition, electrical work.
- (2) Carriage by land or water and loading or unloading in connection therewith, including the distribution of any commodity by horse drawn or motor driven vehicle where the employer employs more than three employees in the business.
- (3) All warehouse operations.
- (4) Mining, surface mining or quarrying.
- (5) All enterprises where explosives, molten metals, injurious gases or vapors, or corrosive acids, are manufactured, used, generated, stored, or conveyed.
- (6) All enterprises wherein machinery is used, now or hereafter subject to statutory regulations.

In determining whether any particular business or enterprise comes automatically under the act, regard is to be had for the particular circumstances. If the occupation is one of those specifically enumerated, no difficulty is presented. It is safe to assume that all construction work, mines, quarries, sawmills, bridge-building, trucking, teaming, manufacturing, warehouses, handling of explosives, molten metals, gases, corrosive acids, etc., are under compensation laws. And the final subsection, covering all enterprises wherein machinery is used subject to statutory regulation, takes in a vast number of enterprises not expressly mentioned; all enterprises in effect in which machinery is used. For example, the Illinois Supreme Court has held¹ that a manual training department of a township high school was an "enterprise" within the meaning of the Compensation Act. In this case a manual training teacher, in the performance of his teaching duties, was injured while operating a power-driven buzz saw, and it was held that he was entitled to recover compensation. The school district, by virtue of the machinery installed in the high school, was subject to the provisions of the compensation statute, though without knowledge of the fact.

Also all operations which are by their nature hazardous are subject to the compensation law, whether or not they are specifically mentioned in the statute. Thus a detective employed

¹ Board of Education v. Industrial
Conn., 301 Ill. 611, 134 N.E. 70 (1922).

as night watchman in guarding a building, who was shot by a burglar, was held entitled to compensation as being under the act, in spite of the fact that no mention is made therein of this occupation.

ILLINOIS PUBLISHING & PRINTING CO. v. INDUSTRIAL
COMMISSION et al.

Supreme Court of Illinois, 1921. 299 Ill. 189, 132 N.E. 511.

THOMPSON, J. Philip A. Coates, deceased, was employed by the Illinois Publishing & Printing Company as an advertising solicitor for the Chicago Herald and Examiner, a newspaper published by it. He went from place to place in the city of Chicago and elsewhere for the purpose of securing advertising to be published in said newspaper. * * * While he was driving on the public streets of Chicago, he was killed in a collision between his own car driven by him and another car driven by Abraham Rubenstein. * * *

Section 3 of the Compensation Act of 1919, Laws 1919, p. 539, Smith-Hurd Stats. c. 48, § 139, provides that the provisions of the act shall apply automatically and without election to all employers and their employees engaged in any of the enterprises or businesses which are declared by the act to be extrahazardous. It is admitted that plaintiff in error is engaged in an enterprise in which statutory and municipal ordinance regulations are imposed for the regulating and guarding of machinery and appliances for the protection and safeguarding of its employees and the public. There are located in the ten-story building which it occupies, typesetting machines, printing presses and other machinery used in printing a newspaper, and electrically propelled elevators used for carrying passengers and freight from floor to floor. It is contended by plaintiff in error that the only employees covered by the act are those directly exposed to the hazards peculiar to the business or enterprise of the employer, and that it does not cover such employees as salesmen, bookkeepers and stenographers, who are not exposed to the special hazards. * * *

It seems to be well established by this court that it is the business or enterprise of the employer that controls. * * *

In the Suburban Ice Co. Case [274 Ill. 630, 139 N.E. 979] it was the machinery in the ice plant and the operation of the ice storage house that brought the business of the employer within the act, but the employee's injury was not caused by the hazards peculiar to the ice plant or to the warehouse, but by the kick of a horse—a hazard common to all industries where horses are used. In the Gibson Case [276 Ill. 73, 114 N.E. 515] it was the handling of explosive materials that brought the employers under the act, but the employee was not injured by the explosion of gasoline, but by being run over by an empty gasoline tank wagon—a hazard common to all teamsters. In the Chicago Dry Kiln Co. Case [276 Ill. 556, 114 N.E. 1009, Ann. Cas. 1918B, 645] it was the machinery in the planing mill that brought the employer under the act, but the employee was not injured by this machinery, and his death was not due to a hazard peculiar to the business. In the Pekin Cooperage Co. Case [277 Ill. 53, 110 N.E. 128] the employer was brought under the act because power-driven machinery was used in its plant, but the employee was injured by being thrown onto a cement floor by fellow employees while waiting in line for his pay. In the Friebel Case [280 Ill. 76, 117 N.E. 467] the injury to the employee did not grow out of any of the hazards due to the business of operating a warehouse, but it was occasioned by a collision between a street car and a truck with which the employee was working; and in the Hahnemann Hospital Case [282 Ill. 316, 118 N.E. 767] it was not because the hospital building was seven stories high and had in it an electrically operated elevator that the employee was killed, but the death resulted from his slipping and falling into the basement, as he might have done in his own home. This court has therefore long ago established the proposition that the jurisdiction of the Industrial Commission is to be determined by the business or enterprise of the employer and not by the particular kind of work or the particular thing that the employee may be doing at the time of the injury. * * *

Judgment affirmed.

(2) NONHAZARDOUS EMPLOYMENTS UNDER THE ACT ONLY BY ELECTION

Employers engaged in nonhazardous businesses are not subject to Workmen's Compensation Law except where they have elected voluntarily to come under the act, or except as to hazardous special work in the employment.

The great majority of Workmen's Compensation Acts are elective as to employers engaged in nonhazardous employments. All employments not declared by the statute as hazardous, and not hazardous per se, do not come within the provisions of compensation law, save by the voluntary desire and election of employer and employee. In twelve states, election to operate under the provisions of the compensation law is presumed, both as to employer and employee, in the absence of notice to the contrary. In Oregon and Illinois, the employer in a nonhazardous employment must file written notice of his intention to come under the act. As to the employee, in all states he is presumed to have accepted the act, unless he files notice to the contrary.

Most statutes deprive the employer of the common-law defenses in the event that he has elected not to be bound by the provisions of the compensation law. The situation, then, is that the employer is deprived of the advantage of limited liability as provided in the act, and the amount of damage will be fixed by the jury, but that, on the other hand, the liability of the employer will depend upon proof of his negligence.

Nonhazardous Work in Hazardous Employment.—In general, it may be said that an employee engaged in one of the employments named in the Compensation Act can recover thereunder, although injured while doing work of a kind not ordinarily included in such an employment. For example, a draftsman employed by a building contractor, who suffers an injury to his ankle against the edge of the drafting table, from which tuberculosis of the bone develops, would be entitled to claim compensation under the act, though the work of drafting is nonhazardous. It is sufficient that the general employment is hazardous.

Hazardous Work in Nonhazardous Employment.—Where the general employment is nonhazardous, and there was no election

to come under the act, an injury received by an employee is not compensable. But, where the injury was incurred while the employee was doing hazardous work, then the fact that the principal employment was nonhazardous does not govern, and the employee will be entitled to compensation.

WENDT v. INDUSTRIAL INSURANCE COMMISSION OF WASHINGTON.

Supreme Court of Washington, 1914. 80 Wash. 111, 141 P. 311.

[From the evidence it appeared that the defendant, a department store in Seattle, Washington, kept a repair shop where their own vehicles were kept in order. A carpenter, while turning on a switch to start an emery wheel, so that he could sharpen a tool, received an electric shock which caused his death. It was urged that the defendant employer was not liable under the Compensation Act (Laws 1911, c. 74), for the reason that the general merchandising business was not hazardous, within the meaning of the Washington act, and there was no election to be bound by the provisions of the act.]

MORRIS, J. * * * If we could so construe the act that the extrahazardous character of the employer's business was to be determined by the business he was principally engaged in, we might accept the finding of the commission; but the act, as we have seen, recognizes the fact that the same employer may conduct different departments of business, some of which fall within the act, some of which do not. And in this connection it matters not which is the principal business and which is the incidental business. If the employer conducts any department of his business, whether large or small, as an extrahazardous business within the meaning and defined terms of this act, his workmen would come within the class designated by the act, and be entitled to the protection of the act. * * *

(3) AGRICULTURAL EMPLOYMENT

Almost without exception, the compensation acts of all the states expressly exempt agricultural employment from compulsory inclusion.

Farmers or agriculturists and laborers employed in agriculture are expressly excepted from the operation of almost all of the Compensation Acts. Whether or not a farmer is engaged in a hazardous enterprise, he is not bound to pay compensation for injuries received by his employees. Even where a farmer operates a threshing machine on his farm, and one of his laborers is injured or killed by the machine, the farmer will not be liable under the compensation law. Farmers may elect to come under the compensation law, for the purpose of securing the limited liability thereby imposed, for if they are not under the act they are governed by the common-law liability of master to servant for injuries received by the latter resulting from the master's negligence, and there is no limit fixed by the law to a jury's verdict affixing damages.

JACK v. BELIN'S ESTATE.

Superior Court of Pennsylvania, 1942. 149 Pa.Super. 531, 27 A.2d 455.

Proceedings under the Workmen's Compensation Act by Edward Jack, claimant, opposed by estate of Paul B. Belin, deceased, and others. From a judgment denying compensation, claimant appeals.

Affirmed.

HIRT, J. On August 15, 1939, claimant was injured when he fell from a ladder while removing whitewash from the roof of a green house where he was employed. He was permanently disabled by the injury. Both the referee and the board disallowed compensation on the ground that claimant was a domestic servant and as such was not entitled to compensation because of the Act of June 21, 1939, P.L. 565, 77 P.S. § 1a, which provides that the Compensation Act shall not "apply to or in any way affect any person who at the time of injury is engaged in domestic service or agriculture." The lower court affirmed. There is ample testimony to support the findings of fact as to the nature of claimant's employment and the conclusion that claimant was not an employee within the definition of the Act. * * *

Claimant considered himself a gardener and there was no change in the nature of his employment after the death of Paul

B. Belin. He, however, had duties other than gardening. Every morning he delivered milk and, at times, butter and eggs or produce raised on the estate, by means of a farm truck, to the mansion house and to the homes of the sons and to the families of the workmen who lived on the estate. On occasion he hauled top soil for the gardens, groceries and other supplies from Scranton and feed for the cattle. His principal duty, however, was to operate the greenhouse where he raised plants which he later transferred to the flower beds. He also grew flowers for cutting and delivered a daily supply to the mansion house and to the sons' homes. On rare occasions, excess stock from the barn was sold, but the conduct of the estate was not a commercial enterprise in any of its phases. It was operated solely for the benefit of the widow and the sons, and incidentally, for the maintenance of servants and employees and their families, who lived and worked on the estate.

The question, here raised, involves a construction of the above act of assembly to determine its scope and intent. In a strict sense a domestic servant is one who resides in the same house with the master whom he serves (1 Bouv.Law Dict., Rawle's Third Rev., p. 914); one who lives in the family of another as a hired household assistant; a house servant (19 C.J. 389; 27 C.J.S., Domestic, p. 1318; 1 Blackstone 328). But, in its broader meaning, "domestic" also includes services "pertaining to one's house or home, or one's household or family; relating to home life." (Webster).

The coupling of domestic servants with agricultural workers, in the same Act, is significant. Agricultural workers are those who are engaged in an enterprise conducted by the employer for his profit. House servants merely contribute to the personal needs and comfort of the employer. Between the two groups are the outservants, who in strictness do not fall within either class. And yet there is much better reason for excluding gardeners, caretakers and the like, than agricultural workers, for they are not engaged in a commercial enterprise and their services all relate to the home life. Our conclusion, in construing the Act, is that the place where the services are performed does not determine the nature of the employment. Cooks and house maids are domestic servants, not because they work indoors, but because they serve the needs of the household. Similarly, one who

drives an automobile in bringing supplies from market or in disposing of waste materials or who raises vegetables and produce for use on the estate is a domestic servant in the broader sense contemplated by the Act. Growing flowers for the delight and pleasure of the family of the owners is the same kind of service. Where, as here, the grounds, though extensive, are maintained as the curtilage to the mansion house and for the comfort and pleasure of the occupants, they who thus minister to the needs of the owners, according to the standard of living established by them, are domestic servants within the purview of the Act.

* * *

We think it clear that "domestic service" was intended to include services such as were rendered by claimant. Though totally, and perhaps permanently, disabled by a most unfortunate accident, he is excluded from all benefits under the Compensation Act.

Judgment affirmed.

(4) INDEPENDENT CONTRACTORS

Liability under compensation statutes depends upon the existence of the relation of employer and employee. A servant of an independent contractor is not the servant or employee of the owner of the property on which a structure is being built, and such owner is not obligated to compensation.

POWLEY v. VIVIAN & CO., Inc., et al.

Supreme Court of New York, Appellate Division, Third Department, 1915.
169 App.Div. 170, 154 N.Y.S. 426.

LYON, J. The single question for determination upon this appeal is whether the claimant, at the time he was injured, was an employee of the defendant, Vivian & Co., Incorporated, within the meaning of the Workmen's Compensation Law, or was an independent contractor. Vivian & Co., Incorporated, herein-after mentioned as "Vivian Co.," was engaged, under a contract with one Coen, in dredging waters at Oyster Bay, N. Y., for which service it was to be paid for the quantity of sand and gravel removed. It was the owner of scows within which to dump and

carry away the material dredged. The claimant was the owner of a dredging machine and appurtenances, and of the cooking, culinary, and commissary equipment thereof.

In July, 1914, the claimant and Vivian Co. entered into an agreement in writing by which the claimant agreed to furnish his dredge with its equipment and appurtenances in good working order to Vivian Co. for the use of Vivian Co. in its dredging operations during the continuance of an assigned contract between Vivian Co. and Coen. * * *

In accordance with this agreement, the claimant furnished the dredge with its equipment, together with the personal property mentioned in the agreement, and the performance of the work specified in the Coen contract was entered upon. Following the injury to claimant, the management of the operation of the dredge was continued by a person employed by the claimant. For use in connection with the dredging operations was a motor launch of which Vivian Co. was the lessee, from some person other than the claimant, which was used in carrying the men and supplies between the shore and the dredge, and was used generally wherever needed in connection with the dredging operations. In September, 1914, the claimant, in order to crank the motor, took hold of the cranking handle upon the flywheel. The motor back-fired, and the handle struck the claimant, breaking his right arm at the wrist. This is the injury for which compensation is sought.

The Workmen's Compensation Commission found as conclusions of fact that on the day the claimant received his injuries, he was employed by Vivian Co. as an operator of a dredging machine; that on said date, while claimant was attempting to start a motor on a motor boat which was operated in connection with the dredge, the motor back-fired, and broke his right wrist; that such injuries were accidental injuries, and arose out of and in the course of his employment; and that the claim came within the provisions of the Compensation Law. The Commission, having fixed the average weekly wages of claimant at \$26.54, made an award to him of \$15 per week for 6 weeks, beginning at the expiration of 2 weeks from the happening of the injury. From such award, this appeal has been taken by both the employer and the insurer.

Manifestly the first question to be considered is whether under the agreement the claimant was an employee or an independ-

ent contractor. Section 3 of the Compensation Law defines the term "employer," as used in the act, as a " * * * corporation * * * employing workmen in hazardous employments," and defines the term "employé" as a " * * * person who is engaged in a hazardous employment in the service of an employer carrying on or conducting the same. " * * * " An "independent contractor" is defined as one who exercises an independent employment and contracts to do a piece of work according to his own method and without being subject to the control of his employer, save as to the results of his work. Alexander v. R. A. Sherman Sons Co., 86 Conn. 292, 85 A. 514. The true test of a contractor would seem to be that he renders the service in the course of an independent occupation, representing the will of his employer only as to the result of his work, and not as to the means by which it is accomplished. The one indispensable element to his character as an independent contractor is that he must have contracted to do a specified work and have the right to control the mode and manner of doing it. Shearman & Redfield on Negligence, 6th Ed., § 164; * * * Andrews v. Boedecker, 17 Ill.App. 213. An independent contractor is not in any legal sense a servant of his employer, but is one exercising an independent employment under a contract to do certain work by his own methods without subjection to the control of his employer, except as to the product or result of the work.

* * *

While frequently it is difficult to distinguish between the position of servant, and that of a person exercising an independent calling, the evidence in this case strongly tends to relieve the uncertainty. The claimant was a contractor of 20 years' experience in dredging operations, and concededly thoroughly competent to manage the operation of a dredge. While he was required to bear the expense of necessary repairs and new parts to the machinery, he had no power to hire or discharge a man, and paid no part of the dredging expenses. Vivian Co. paid the wages of the crew, the expenses of the commissary department, or the board of the crew, and for all fuel, oil, and operating expenses of every kind. That the relation of the claimant to Vivian Co. in hiring out with his dredge was that of a person exercising an independent calling, and not that of a mere employee, is manifest throughout the agreement. This is particularly apparent

from the clauses before quoted, by which no right of control of the management of the operation of the dredge was vested in Vivian Co., but was vested wholly in the claimant or in his substitute; that Vivian Co. should use no other dredge so long as the claimant's dredge was able to do the work required by the Coen contract; that neither party should be liable to the other, or to third parties, for the negligent acts or omissions of the other; and that the obligations and benefits of the agreement should be binding upon and extend to the heirs, representatives, and assigns of the respective parties, thus apparently recognizing the right of either party to voluntarily dispose of his or its interest in the contract, and providing for its continuance in that event, or in the event of the death of the claimant. The fact that Vivian Co. may from time to time have directed the particular places at which the sand and gravel should be taken out was in no way inconsistent with the claimant's relation being that of an independent contractor. "The mere fact of direction as to things to be done, without control over the methods or means of doing them, does not make a contractor a servant." Shearman & Redfield on Neg. § 164. The mere fact that a person hiring a livery team may direct the driver where to go, and at what speed, does not create the relation of master and servant. Kellogg v. Church Charity Foundation, 203 N.Y. 191, 197, 96 N.E. 406, 38 L.R.A.,N.S., 481, Ann.Cas.1913A, 883. The provisions of the agreement and the acts of the parties under it, as disclosed by the record, are consistent only with the relation of the claimant being that of a person exercising an independent calling. To that relation, by itself, the Compensation Law does not apply.

However, at the time of sustaining the injury the claimant was not engaged in the specific work of managing the operation of the dredge. He was necessarily, he says, transporting supplies to the dredge when he sustained the injury. Vivian Co. was obligated by the agreement to furnish these supplies. The launch man was its employee, and it was its duty to furnish a man to run the launch. In performing that duty Vivian Co. failed, and, as the claimant says, "I had to get the supplies myself." In the performance of that act the claimant is to be regarded, not as an independent contractor, but as an employee, within the intent of the Workmen's Compensation Law. "One who has an

independent business, and generally serves only in the capacity of a contractor, may abandon that character for a time, and become a mere servant or agent, and this, too, without doing work of a different nature from that to which he is accustomed; * * * and he may even be a contractor as to part of his service and a servant as to part." Shearman & Redfield on Neg., 6th Ed., § 165. Where an independent contractor had finished a building, it was held that in throwing waste material from the roof he was acting as a servant of the owner. *Swart v. Justh*, 24 App.D.C. 596.

The provision in the agreement by which each party exempted the other from all acts of fault or omission, even if in terms applicable to a claim of this character, would be wholly ineffective. An agreement by an employee to waive his right to compensation under the Workmen's Compensation Law is not only void as against public policy, but also under the express provision of section 32 of that act. * * *

The award should therefore be affirmed.²

(5) EMPLOYEES ENGAGED IN INTERSTATE COMMERCE

The Constitution of the United States takes away from the states and gives to the federal government jurisdiction and control of interstate commerce. Therefore the Federal Employers' Liability Act, passed by Congress, applies to all employees engaged in interstate commerce.

Under the federal statute, liability to pay compensation is conditioned upon proof that the injury to the employee was occasioned by the employer's negligence.

Employees engaged in interstate commerce do not come under the provisions of the state Compensation Acts. The Constitution of the United States gave to Congress the right to regulate

² A quarryman, furnishing his own blasting materials and teams, and paid by the cord, was held to be an independent contractor, and not an employee, as was also the decision as to a taxicab driver, receiving one-

fourth of the proceeds for his services in operating the company's car. The question is one of intention, to be ascertained from the circumstances on the basis of the test of control.

interstate commerce, and since Congress has enacted the Federal Employers' Liability Act, 45 U.S.C.A. §§ 51–60, the provisions of that law apply exclusively. As to all employees engaged in intrastate commerce, on the other hand, the state compensation law governs. The problem, then, in each case, is to determine whether the commerce was inter or intra state.

The Federal Employers' Liability Act provides compensation for employees of interstate carriers only where the injury resulted from the employer's negligence. The state compensation laws, however, provide compensation to the injured employee, irrespective of fault; the question as to whether the employer was negligent or not is wholly immaterial. Therefore, where an employee of a railroad suffers an injury which is wholly accidental, not traceable to any fault on the part of the employer, the question as to whether the employee was engaged in inter or intra state commerce becomes of vital importance. If he were engaged in interstate commerce, his rights are governed by the Federal Employers' Liability Act, and, there being no negligence, there is no liability. But, if his work were intrastate in character, he could recover compensation under the Compensation Act irrespective of negligence.

RAYMOND v. CHICAGO, M. & ST. P. R. CO.

Supreme Court of the United States, 1917.
243 U.S. 43, 37 S.Ct. 268, 61 L.Ed. 583.

Mr. Chief Justice WHITE delivered the opinion of the court.

Raymond, the plaintiff in error, sued the railway company, a foreign corporation doing business in Washington, to recover damages resulting from injuries sustained by him while in its employ. The petition alleged that the defendant operated an interstate commerce railroad between Chicago and Seattle, and that, for the purpose of shortening its main line and making more efficient and expeditious its freight and passenger service, was engaged in cutting a tunnel through the mountain between Horrick's Spur and Rockdale, in Washington. It was averred that plaintiff was employed by the defendant in the tunnel as a laborer, and that, while he was at work, his pick struck a charge of dynamite which, through the defendant's negligence,

had not been removed, and that from the explosion which followed he has sustained serious injuries.

The defendant's answer contained a general denial and alleged that at the time and place of the accident the railroad and Raymond were not engaged in interstate commerce, since the tunnel was only partially bored, and hence not in use as an instrumentality of interstate commerce. It was further alleged that the court was without jurisdiction to hear the cause because of the provisions of the Washington Workmen's Compensation Act (Laws 1911, c. 74), with whose requirements the defendant had fully complied. The reply of the plaintiff admitted the facts alleged in the answer, but denied that they constituted defenses to the action.

The trial court entered a judgment for the defendant on the pleadings, and this writ of error is prosecuted to a judgment of the court below, affirming such action. 233 F. 239, 147 C.C.A. 245.

Considering the suit as based upon the Federal Employers' Liability Act, it is certain, under recent decisions of this court, whatever doubt may have existed in the minds of some at the time the judgment below was rendered, that, under the facts as alleged, Raymond and the railway company were not engaged in interstate commerce at the time the injuries were suffered, and consequently no cause of action was alleged under the act.

* * *

It is also certain that if the petition be treated as alleging a cause of action under the common law, the court below was without authority to afford relief, as that result could only be attained under the local law, in accordance with the provisions of the Washington Workmen's Compensation Act, which has this day been decided to be not repugnant to the Constitution of the United States. Mountain Timber Co. v. Washington, 243 U.S. 219, 37 S.Ct. 260, 61 L.Ed. 685, Ann.Cas.1917D, 642. And this result is controlling even although it be conceded that the railroad company was, in a general sense, engaged in interstate commerce, since it has been also this day decided that that fact does not prevent the operation of a state Workmen's Compensation Act. New York Cent. R. Co. v. White, 243 U.S. 188, 37 S.Ct. 247, 61 L.Ed. 667, L.R.A.1917D, 1, Ann.Cas.1917D, 629.

Affirmed.

LOUISVILLE & N. R. CO. v. POTTS.

Supreme Court of Tennessee, 1942. 178 Tenn. 425, 158 S.W.2d 729.

Proceedings under the Workmen's Compensation Act, Code 1932, § 6851 et seq., by Mrs. Beatrice Potts and others, claimants, opposed by the Louisville & Nashville Railroad Company, employer. To review a judgment for claimants, the employer brings error.

Reversed and case dismissed.

DEHAVEN, J. This is a suit brought under the workmen's compensation Law of Tennessee, Code § 6851, et seq. The petitioners are the widow and children of O. B. Potts, deceased, who at the time of his death, and for a considerable period of time prior thereto, was employed by plaintiff in error as fireman on a switch engine operating in and around Columbia, Maury County, Tennessee. It is averred in the petition that on November 7, 1940, while so employed, and while engaged in intrastate commerce, that deceased, in the course of his employment received serious injuries as the result of an accident, from which injuries he died on November 10, 1940.

The Railroad Company made answer and denied that O. B. Potts, while engaged in intrastate commerce, in the course of his employment, received serious and accidental injuries resulting in his death. It was averred O. B. Potts had on the date of the alleged accident been drinking heavily, and was intoxicated as the result of his willful misconduct in the use of alcohol and was attempting to work in that condition, and while standing on the ground at the side of the train, he became dizzy from drink and fell to the ground, slightly cutting his head, which injuries were not of a serious nature and did not cause his death, but he continued to suffer from his alcoholic excesses and died from delirium tremens.

On the hearing, the trial judge found the issues in favor of the petitioners, and awarded compensation as prayed. He made a written finding of fact and, among other things, found, in substance, that on November 7, 1940, O. B. Potts reported for duty to the respondent railroad, at Mount Pleasant, Tennessee, in good health, and that the work assigned him was fireman for a mining

switch crew; that after reporting for work at approximately 6:30 A. M., the switching crew, including Potts, proceeded to Columbia, Tennessee, and from there to Perrico Junction, in Maury County, Tennessee, for the purpose of hauling thirteen cars of muck consigned to the Armour Fertilizer Company, located in Maury County, Tennessee. He further found, "that all of said activity of said crew at the time of the accident herein-after set out was not interstate but was intrastate commerce."

The respondent railroad has appealed to this court and assigned errors.

It is complained that the trial judge was in error in finding that "said crew proceeded to Columbia, Tennessee, and from there to Ferrico Junction," etc., it affirmatively appearing in the evidence that after the crew reached Columbia, it then engaged in handling interstate cars, and then later proceeded to Perrico Junction and brought back to Columbia the thirteen cars of muck, and then proceeded to handle cars in interstate commerce.

Section 6856 of the Code, compensation law, provides:

"This chapter shall not apply to: (a) Any common carrier doing an interstate business while engaged in interstate commerce."

The evidence shows without contradiction that, on November 7, 1940, Potts was a fireman on a switch engine, working with a switching crew, engaged in switching various cars at Columbia, Tennessee, some of which were interstate and some intrastate. Both before and after this crew went to Perrico Junction for the thirteen intrastate cars, they engaged in switching interstate and intrastate cars on the yards at Columbia. It is shown that it was the duty of this switch engine crew to place "just whatever was on the tracks," regardless of where the cars were going.

Counsel for the plaintiff in error invoke the amendment of August 11, 1939, to the Federal Employers' Liability Act, 45 U.S.C.A. § 51, providing as follows:

"Any employee of a carrier, any part of whose duties as such employee shall be the furtherance of interstate or foreign commerce; or shall, in any way directly or closely and substantially, affect such commerce as above set forth shall, for the purposes of this chapter, be considered as being employed by such carrier

in such commerce and shall be considered as entitled to the benefits of this chapter. Apr. 22, 1908, c. 149, § 1, 35 Stat. 65; Aug. 11, 1939, c. 685, § 1, 53 Stat. 1404."

Prior to the above amendment, it was generally held that the true test as to whether an injured employee was in interstate commerce at the time he received his injuries, so as to make applicable the Federal Employers' Liability Act, was the nature of the work he was doing at the time of the injury. *Erie Railroad Company v. Welsh*, 242 U.S. 303, 37 S.Ct. 116, 61 L.Ed. 319. And that the character of work done by a railroad employee at times other than when he was injured was immaterial in determining whether he was at the time of injury engaged in interstate commerce. *Chicago & Northwestern Railway Co. v. Bolle*, 284 U.S. 74, 52 S.Ct. 59, 76 L.Ed. 173.

The amendment of August 11, 1939, evidences a legislative intent of the congress to extend the Federal Employers' Liability Act to all railroad employees whose duties pertain to the furtherance of interstate or foreign commerce, or which in any way directly or closely and substantially affect such commerce. Prior to the amendment, it was often a matter of difficulty for an injured employee to know, and for the courts to ascertain whether or not at the time of the accident he was engaged in interstate commerce. One moment the employee might be engaged in an interstate movement, and the next moment in an intrastate movement. In the instant case, the crew of the switch engine was engaged in general switching of cars at Columbia, Tennessee. Some of the cars were moving in interstate commerce and some were not. It is true that at the time of the accident, the crew was handling cars in a intrastate movement; but that operation was a mere incident to the general business of switching cars at Columbia.

We hold that the duties of Potts, as fireman on the switch engine, under the facts shown in evidence, did pertain to the furtherance of interstate commerce, and did directly and closely and substantially affect such commerce. * * *

The result is that the judgment of the trial court must be reversed and the case dismissed at the cost of petitioners.

MASTRANDREA v. PENNSYLVANIA R. CO.

Circuit Court of Appeals of the United States, Third Circuit, 1942.
132 F.2d 318.

Action under the Federal Employers' Liability Act by Grace Mastrandrea, administratrix of the estate of Marco Anthony Mastrandrea, deceased, against the Pennsylvania Railroad Company, for the death of plaintiff's intestate. From an adverse judgment, plaintiff appeals.

Judgment affirmed.

PER CURIAM. Marco Anthony Mastrandrea, for whose death the administratrix of his estate seeks damages, was for many years a crossing watchman for the defendant railroad company. While in the performance of his duties as watchman at a main line crossing in Carnegie, Pennsylvania, he was struck by the side of the locomotive of a rapidly moving freight train and received injuries which caused his death almost immediately. The crossing was frequently traversed by trains engaged in interstate commerce, as was the train whose locomotive struck him.

In order to save from harm several children of tender years, whose actions gave indication of their intent to enter upon the crossing forthwith, Mastrandrea placed himself in a position of danger, in relation to the oncoming freight train, from which position he was unable to extricate himself in time to avoid being struck. In thus laying himself open to great danger in order to protect others, without thought of his own safety, his conduct was truly heroic.

But the plaintiff's suit for damages, which, under the circumstances, was necessarily based upon the right of action conferred by the Federal Employers' Liability Act, 45 U.S.C.A. § 51 et seq., required proof showing the defendant guilty of negligence which was the proximate cause of the fatal injuries received by Mastrandrea. Unfortunately for the plaintiff, the record in the case is barren of any facts which would justify a jury's finding that the defendant company, its agents, or servants failed to exercise ordinary care either in the operation of the train whose locomotive inflicted the fatal injuries or in any other particular relating to the accident. We, therefore, have

no alternative under the law but to affirm the judgment of the court below, which ruled to like effect.

From the standpoint of a recovery by law for the death of this faithful employee in connection with his employment the case portrays an unfortunate legal situation. As we have seen, no recovery can be had under the Federal Employers' Liability Act, since the plaintiff was unable to prove the defendant negligent. On the other hand, there is no Federal compensation law applicable to the employees of carriers of interstate commerce by rail. And yet, the exclusive applicability of the Federal Employers' Liability Act, under the circumstances obtaining in this case, precluded a claim by Mastrandrea's dependents for compensation under the State Compensation Law, 77 P.S. § 1 et seq. Such a situation would seem to merit appropriate legislative consideration and correction.

The judgment of the District Court is affirmed.

(6) EMPLOYEES UNDER ADMIRALTY JURISDICTION

In addition to interstate commerce, admiralty jurisdiction by the Constitution of the United States is placed within the control of the federal government, and is therefore exclusive of state statutes. Thus an employee, injured while engaged in work connected with the operation or maintenance of agencies of commerce on navigable waters, could recover from his employer only under the common-law doctrine of liability for negligence, and not under the state workmen's compensation statute.

The test of admiralty jurisdiction finally laid down by the United States Supreme Court is the test of the place where the accident occurred.

If admiralty law controls as to the question of compensation for an injured employee, then the state compensation law can have no effect. The chief difficulty is encountered in determining and applying the test of admiralty jurisdiction.

What was originally thought to be the test was the character of the contract of employment. If it was a "maritime contract," that is, an employment to work on, or in connection with, a vessel lying in navigable waters, admiralty jurisdiction was held

to control. In the following case this test was repudiated by the Supreme Court, and the test as laid down was the *place where the accident occurred*. If on the land, or on an extension of the land, such as a dock, the state law controls. If on navigable waters, the federal admiralty law governs.

STATE INDUSTRIAL COMMISSION OF NEW YORK v.
NORDENHOLT CORPORATION et al.

Supreme Court of the United States, 1922.
259 U.S. 263, 42 S.Ct. 473, 66 L.Ed. 933, 25 A.L.R. 1013.

Mr. Justice McREYNOLDS delivered the opinion of the court.

Sebastiana Insana, mother of Guiseppe Insana, asked of the New York State Industrial Commission an allowance under the Workmen's Compensation Law (Consol.Laws, c. 67), on account of her son's death, which she claimed resulted from accidental injuries received May 15, 1918, in the course of his employment as a longshoreman by the Nordenholt Corporation then unloading a vessel lying in navigable waters at Brooklyn. The cargo consisted of bags of cement. These were hoisted to the dock and there tiered up by Insana and other longshoremen. While thus engaged, he slipped and fell on the dock.

The Commission found "the accidental injuries which the said deceased sustained while working for his employer when he fell from the pile of bags to the floor were the activating cause of his death, and his death was a direct result of the injuries sustained by him while engaged in the regular course of his employment," and awarded compensation as specified by the statute. Upon authority of *Matter of Keator v. Rock Plaster Manufacturing Co.*, 224 N.Y. 540, 120 N.E. 56, and *Matter of Anderson v. Johnson Lighterage Co.*, 224 N.Y. 539, 120 N.E. 55, the Appellate Division reversed the award (*Insana v. Nordenholt Corporation*, 195 App.Div. 913, 185 N.Y.S. 933), and the Court of Appeals affirmed its action, without opinion, October 25, 1921 (232 N.Y. 507, 134 N.E. 549).

In both the *Matter of Keator* and of *Anderson*, the employee suffered injuries on land while helping to unload a vessel lying in navigable waters. The Court of Appeals held, when so in-

jured, he was performing a maritime contract, and that for reasons stated in *Matter of Doey v. Howland Co., Inc.*, 224 N.Y. 30, 120 N.E. 53, the Industrial Commission had no jurisdiction to make an award. While making repairs on an ocean-going vessel lying at the dock in navigable waters, Doey fell down the hatchway and sustained fatal injuries. The Appellate Division reversed an award of compensation, and the Court of Appeals affirmed its action, holding that, as Doey was performing a maritime contract, the Commission had no jurisdiction, under the doctrine of *Southern Pacific Co. v. Jensen*, 244 U.S. 205, 37 S.Ct. 524, 61 L.Ed. 1086, L.R.A.1918C, 451, Ann.Cas.1917E. 900.
* * *

The court below has made deductions from *Southern Pacific Co. v. Jensen*, *Clyde Steamship Co. v. Walker*, and *Knickerbocker Ice Co. v. Stewart*, 253 U.S. 149, 40 S.Ct. 438, 64 L.Ed. 834, 11 A.L.R. 1145, which we think are unwarranted, and has proceeded upon an erroneous view of the federal law.

When an employee working on board a vessel in navigable waters, sustains personal injuries there, and seeks damages from the employer, the applicable legal principles are very different from those which would control if he had been injured on land while unloading the vessel. In the former situation the liability of employer must be determined under the maritime law; in the latter, no general maritime rule prescribes the liability, and the local law has always been applied. The liability of the employer for damages on account of injuries received on shipboard by an employee under a maritime contract is matter within the admiralty jurisdiction; but not so when the accident occurs on land.

The injuries out of which *Southern Pacific Co. v. Jensen* arose occurred on navigable waters, and the consequent rights and liabilities of the parties were prescribed by the maritime law. The question there was whether these rules could be superseded by the workmen's compensation statute of the state, and this court held they could not. * * *

Insana was injured upon the dock, an extension of the land (Cleveland, etc., *R. R. Co. v. Cleveland S. S. Co.*, 208 U.S. 316, 28 S.Ct. 414, 52 L.Ed. 508, 13 Ann.Cas. 1215), and certainly prior to the Workmen's Compensation Act the employer's liability for damages would have depended upon the common law

and the state statutes. Consequently, when the Compensation Act superseded other state laws touching the liability in question, it did not come into conflict with any superior maritime law. And this is true whether awards under the act are made as upon implied agreements or otherwise. The stevedore's contract of employment did not contemplate any dominant federal rule concerning the master's liability for personal injuries received on land. In Jensen's Case, rights and liabilities were definitely fixed by maritime rules, whose uniformity was essential. With these the local law came into conflict. Here no such antagonism exists. There is no pertinent federal statute; and application of the local law will not work material prejudice to any characteristic feature of the general maritime law. Compare New York Central R. R. Co. v. Winfield, 244 U.S. 147, 37 S.Ct. 546, 61 L.Ed. 1045, L.R.A.1918C, 439, Ann.Cas.1917D, 1139.

The judgment of the court below must be reversed, and the cause remanded for further proceedings not inconsistent with this opinion.

SECTION 4.—THE INJURY MUST BE ACCIDENTAL

Liability to pay compensation under the state compensation law is universally limited by the wording of the statutes to "accidental injuries." A clear distinction lies between "personal" and "accidental" injuries. Suicide and self-inflicted injuries are not compensable, for they are not accidental.

BARTON v. SKELLY OIL CO.

Supreme Court of New Mexico, 1943. 47 N.M. 127, 138 P.2d 263.

MABRY, J. Plaintiff-appellant claims compensation under the Workmen's Compensation Act of New Mexico, Comp.St.1929, § 156-101 et seq. as amended, for an accidental injury alleged to have resulted from the bite of a poisonous insect and occurring, on June 19, 1941, while plaintiff-appellant was employed

by defendant-appellee in the process of laying an oil pipe line in Lea county. He appeals from an unfavorable decision made by the court without a jury. For convenience, the parties will hereinafter be referred to as plaintiff and defendant, respectively.

It is not disputed that plaintiff was working for defendant at the time and place alleged, and that his average weekly wage was \$23.20. Defendant, its own insurer, defended against the claim upon the ground that it was not compensable since it was not an accident within the meaning of the Act in question, and for the further reason that there was no competent evidence to establish the causal relationship between the alleged accident and the disability suffered. Plaintiff claims for a loss of nine and a half weeks because of the disability resulting from the accidental injury complained of. * * *

The construction of the pipe line in question required the digging of a ditch, or trench, in the earth and through an open country in which ditch, or trench, pipe was laid and through it the oil and gas was thereafter to be transported to market. Plaintiff was employed in putting down the pipe. He was known as a "welder helper" as well as a "pipeliner". The area in which the pipe was laid in the newly dug opening embraced an open country of natural mesa grass, and mesquite, which is a rough, hardy, bushy, wild growth common to much of this area of the country. The testimony of plaintiff himself showed that at the time in question he was working in this area "laying a four inch pipe line down through those mesquites." He further testified, "The first thing I knew my leg began to itch, burned, and I began scratching and I felt a knot swelling up there, and when it began to hurt me pretty bad and I had noticed it there was a great big knot there" * * * * *

Therefore, holding as we do, that there is evidence to support the findings that plaintiff was injured as claimed by the bite of a poisonous insect, and that the assignments of defendant hereinbefore noted are without merit, we have left, then, the question whether plaintiff suffered an "accidental" injury within the meaning of the statute; and we hold that he did. With substantial evidence to support we have the trial court's findings that plaintiff was bitten by some poisonous insect, and that this occurred during the progress of work which required claimant's presence at the point and place where poisonous insects are to be

found. The bite was an unexpected occurrence, admittedly. One working as plaintiff, and under like circumstances, where poisonous insects of the character suspected by plaintiff to have bitten him are commonly to be found in the grass and in the somewhat dense shrubbery of these mesquite areas, is necessarily subjected to a hazard not common to those not working in such trenches and close to the ground as was required by the service in which plaintiff was employed. * * *

GOTTFRIED v. STATE INDUSTRIAL COMMISSION.

Supreme Court of Oregon, 1942. 168 Or. 65, 120 P.2d 970.

LUSK, J. The defendant State Industrial Accident Commission has appealed from a judgment in favor of the plaintiff awarding him compensation for an injury sustained in the course of his employment. * * *

Plaintiff was an employe of the Cherry City Baking Company in Salem. At the time of his injury he was at work making buns and pastry. His duties required him to stand at a machine having a hopper which was filled with dough and was operated in such a way that the dough formed into buns and dropped on a tray which revolved towards the plaintiff. He would take the buns from the tray and place them on pans. The machine at that time was operating at the rate of 220 buns a minute. As he was placing some of the buns on a pan after taking them off the tray he noticed one drop from the tray to the floor at his right. He stooped over quickly to pick it up and throw it in the waste barrel, and in so doing injured his back. Ordinarily the buns did not fall from the tray to the floor, though such an occurrence was not unprecedent, and the plaintiff testified that when it did occur it was his duty to pick up the bun, as he started to do in this instance.

In substance, this is all the evidence relied on by the plaintiff in support of his claim that he sustained an accidental injury within the meaning of the Workmen's Compensation Act.

We are of the opinion that the plaintiff has failed in his proof and that the court erred in denying the defendant's motion for a nonsuit. "This court is committed to the line of cases which

hold that where an unusual or unexpected result occurs by reason of the doing by insured of an intentional act, where no mischance, slip, or mishap occurs in doing the act itself, the ensuing injury or death is not caused through accidental means; that it must appear that the means used was accidental, and it is not enough that the result may be unusual, unexpected, or unforeseen. *Dondeneau v. State Industrial Accident Commission*, 119 Or. 357, 249 P. 820, 50 A.L.R. 1129." *Demagalski v. State Industrial Accident Commission*, 151 Or. 251, 254, 47 P.2d 947, 948. The decisions in this state as well as in other jurisdictions are reviewed in the Demagalski case and no good purpose would be served by going over that ground again. The most recent case, *Chalfant v. Arens et al.*, State Industrial Accident Commission, Or., 120 P.2d 219, decided December 16, 1941, announces no departure from the established rule.

The act of the plaintiff in stooping over to pick up the bun was an intentional act unaccompanied by mischance, slip or mishap, and was the sole cause of his injury. It was the result only—the injury to plaintiff's back—that was unusual, unexpected or unforeseen, and therefore accidental. The promptness which characterized plaintiff's movement cannot be said to metamorphose it from an intentional to an unintentional act.

The plaintiff argues that the accident consisted of the bun falling from the tray to the floor. That may be, but it was in no legal sense the cause of the plaintiff's injury. It was merely the occasion for the plaintiff acting as he did. It might be said that there was an accident to the bun. There certainly was not to the plaintiff.

The judgment is reversed and the cause remanded with directions to enter judgment of involuntary nonsuit.

MOYER v. UNION BOILER MFG. CO.

Superior Court of Pennsylvania, 1943. 151 Pa. 477, 30 A.2d 165.

Proceeding under Workmen's Compensation Act by Ethel Irene Moyer, claimant, for death of her husband, opposed by Union Boiler Manufacturing Company, employer. From a judg-

ment affirming an award of the Workmen's Compensation Board denying compensation, claimant appeals.

Judgment affirmed.

STADTFELD, J. * * * The board without making any detailed findings of fact, affirmed the findings of the referee and his conclusions of law. We quote from its opinion as follows: "The deceased, Joseph Moyer, was employed as an electric welder by the defendant, Union Boiler Manufacturing Company. On September 15, 1937, he was engaged in welding the inside of a buoy during the course of the morning, and at approximately 1:30 P. M. that day, he was transferred to the outside to do some welding on a truck which could not be brought inside. The claimant, Ethel Irene Moyer, in her petition avers that the deceased, having been subjected to the heat and fumes within the buoy, contracted pneumonia from the sudden exposure to wind, rain, and cold on the outside so that his subsequent death from pneumonia was a compensable accident within the meaning of the Workmen's Compensation Act. After an original hearing and rehearing, the Referee found that the death was not an accident within the meaning of the Act and the claimant was not entitled to compensation.

"The sole question presented for our consideration is whether the claimant has sustained the burden of proof resting upon her to prove an accident.

"The claimant has placed much stress on the question of whether the deceased was in the rain that day. We are of the opinion that the controlling point is not whether he was in the rain, but whether, under all the facts of the case, there was an element of accident in the occurrence. * * *

After a careful examination and consideration of the testimony we are of the opinion that it does not establish an "accident" as contemplated under the workmen's compensation law.

The board cited in its opinion the case of Gibson v. Frank Kuhn et al., 105 Pa.Super. 264, 161 A. 456. Quoting from that case: "This man's employment was repairman in connection with his duties as engineer. He, of course, had to go wherever his duties called him. If, in the course of his employment, he was wetted by a rain, there is no element of accident in the occurrence. It would be likely to occur in the usual course of events."

In *Lacy v. Washburn & Williams Co.*, 309 Pa. 574, 164 A. 724, an employe, engaged as a carpenter, contracted pneumonia as a result of working for over an hour in the refrigerating room of an ice cream company, a customer of his employer, and death ensued. It was held that the death was not caused by an accident within the meaning of the Workmen's Compensation Act.

Quoting from the opinion of Mr. Justice Drew, 309 Pa. at page 580, 164 A. at page 726: "The rule deducible from our decisions limits the right to recover compensation to cases where injury or death is due to some unexpected or fortuitous event. From what has been said, we think it can readily be understood that the exposure which caused the death in the instant case was not an accident—as that word is used in our Compensation Act. The chill from which the death resulted, contracted while working for an hour in a refrigerator where the temperature was from 10 to 20 degrees below zero, was not a sudden and unexpected event which took place without expectation, a mere chance or contingency. It was not the result of an untoward occurrence, not expected or designed, a mishap or fortuitous happening, aside from the usual course of events.

Claimant had the burden of showing both an accident in the course of her husband's employment and a resulting injury. *Adamchick v. Wyoming Valley Collieries*, 332 Pa. 401, 3 A.2d 377.

We are of the opinion that the case was correctly decided by the court below.

Judgment affirmed.³

³ Occupational diseases, such as lead poisoning, brass poisoning, arsenical poisoning, of long duration, are not accidental injuries, compensable under the Compensation Acts, because disease cannot be considered an accidental injury, in the sense of an unexpected or unlooked-for happening occurring at a definite time. The Michigan act (Pub. Acts Ex. Sess. 1912, No. 10), as construed in *Adams v. Acme White Lead Works*, 182 Mich., 157, 148 N.W. 485, L.R.A. 1916A, 283, Ann.Cas.1916D, 689 (1914),

was held not to cover occupational diseases, for the reason that the act provides compensation only for accidental injuries. The English Compensation Act did not at first apply to occupational diseases, but in 1906 it was amended so as expressly to declare "diseases due to the nature of the employment" accidental injuries and compensable. The Illinois Act was amended similarly in 1925. Laws Ill.1925, p. 378, Smith-Hurd Stats. c. 48, § 139 et seq.

Those compensation statutes which

E. BAGGOT CO. v. INDUSTRIAL COMMISSION et al.

Supreme Court of Illinois, 1919. 290 Ill. 530, 125 N.E. 254, 7 A.L.R. 1611.

THOMPSON, J. * * * The windlass was operated by the two men, deceased turning one handle and Brodie the other. The last load of pipe hauled up by these men weighed between 250 and 300 pounds. After the pipe was landed on the sixth floor, and while Brodie was untying the rope, deceased started to walk away from the windlass and was seen to be spitting blood. * * * Nothing unusual happened while the work of lifting this last load of pipe was in progress. The work was heavy, but it was the same kind of work that the two men had been doing for a couple of days. The hemorrhages recurred from time to time until October 8, when deceased died. A post mortem examination disclosed a large longitudinal tear and several smaller transverse tears in the walls of the aorta. Prior to September 26, deceased was a strong, healthy man, and had never suffered from hemorrhages or any trouble with his heart or lungs.

Plaintiff in error contends that there is no evidence to support the award of the Industrial Commission, for the reason that there is no competent evidence to support a finding that deceased sustained an accidental injury arising out of and in the course of his employment. * * * In *Schroetke v. Jackson-Church Co.*, 193 Mich. 616, 160 N.W. 383, L.R.A.1917D, 64, the Supreme Court of Michigan reviews at length decisions on the question of what constitutes an accident under compensation acts similar to ours, and it there holds that where an aged watchman, whose duties were to guard the plant and give alarms of fire, had been afflicted with heart disease, and on discovering a fire and giving warning and attempting to extinguish the fire became excited and died from heart failure, his death was accidental. In *Gilliland v. Ash Grove Lime & Portland Cement Co.*, 104 Kan. 771, 180 P. 793, the Supreme Court of Kansas had under consideration a case quite similar to the case at bar. There a workman's employment required him to break rock in a quarry with a 16-pound sledge and load the rock into a car. At noon he was in

provide compensation for "personal" 152, § 1 et seq.), have been held to rather than "accidental" injuries, include occupational disease.
such as the Massachusetts act (G.L. c.

apparent good health and spirits. In the afternoon, while at his working place, and shortly after he had been seen beating a large rock with his sledge, he suffered a pulmonary hemorrhage, from which he died before medical aid could reach him. He had been working in the quarry for several months, and before that had worked for three years in the sacking department of a cement plant. The court, after reviewing the authorities, held that the evidence warranted a finding that the physical structure of the man gave way under the stress of his usual labor, and that the workman did not know, or in any event was inattentive to, the limited power of his blood vessels to resist blood pressure aggravated by vigorous muscular effort. This breaking down of a part of this man's body was held to be an accident.

In the instant case all the characteristics of an accident were present. The occurrence was sudden, unexpected and undesigned by the workman. The circumstances were clearly such that the commission was justified in finding that the hemorrhage was due to blood pressure intensified by vigorous muscular exertion. Relating the hemorrhage to physical exertion, rupture of the aorta by force from within was as distinctly traumatic as if the canal had been severed by violent application of a sharp instrument from without. There was no direct evidence of extraordinary exertion suddenly displayed. When last observed before the first hemorrhage the deceased was working in the manner habitual to his employment. The fact remains, however, that an extraordinary and unforeseen thing suddenly and unpremeditatedly occurred, and presence of all the essential attributes of accident cannot be gainsaid. There was ample evidence in the record to justify the finding of the Industrial Commission that the deceased came to his death by accident and the circuit court therefore properly confirmed the award. * * *

S. & D., ENG. & ARCH. 3RD ED.

SECTION 5.—THE INJURY MUST ARISE OUT OF AND IN THE COURSE OF THE EMPLOYMENT

All workmen's compensation statutes imposed liability upon the employer to pay compensation for injuries "arising out of and in the course of the employment."

For an injury to arise "out of" the employment, there must be a causal relation between the two.

For an injury to arise "in the course" of the employment, it must have been incurred while the employee was in a place to which his duties might reasonably call him and at a time when he is engaged in the performance of said duties.

The fourth condition precedent to the right of an injured employee to recover compensation from his employer under the provisions of the workmen's compensation statutes is that the injury must arise out of and in the course of the employment. For an injury to arise "out of" the employment there must be some causal relation between the employment and the injury; and while it is not necessary that the injury be one which ought to have been foreseen or expected, it must be one which, after the event, may be seen to have had its origin in the nature of the employment. For an injury to arise "in the course of" the employment, it must occur within the period of the employment, where the employee may reasonably be, and while he is reasonably fulfilling the duties of the employment, or is engaged in something incidental to it.

The words "arising out of" and "in the course of" the employment, found in all of the Compensation Acts, are used conjunctively; and in order to satisfy the statute, both conditions must occur.

It is vital to determine in each case whether or not an injury may be said to have arisen out of and in the course of the employment. The extensive interpretation which the courts have given this phrase was not for the purpose of splitting hairs as to the precise meaning of the words used. The basic reason and purpose of the scheme of compensation law is to place upon the industry the burden of loss sustained therein; to make the em-

ployer accountable for injuries sustained by employees directly due to the industry itself. It is not the purpose to make the employer the insurer of his employees at all times, but only as to those injuries with which the particular industry logically may be charged; in other words, only such as arise out of and in the course of the employment.

(1) SCOPE OF EMPLOYMENT IN GENERAL

FUQUA v. DEPARTMENT OF HIGHWAYS.

Court of Appeals of Kentucky, 1943. 292 Ky. 783, 168 S.W.2d 39.

Proceeding under the Workmen's Compensation Act by Eula Fuqua to recover compensation for the death of her husband opposed by the Department of Highways of the Commonwealth of Kentucky and others. Judgment denying compensation, and claimant appeals.

Affirmed.

TILFORD, J. Appellant is the widow of James Fuqua, an employee of the Department of Highways of the Commonwealth of Kentucky. The employer was operating under the Workmen's Compensation Act, KRS 342.001 et seq., and Fuqua had signed the compensation register. On July 24, 1939, Fuqua was engaged, with other members of a maintenance crew under the direction of Fred Tatum, foreman, in cutting weeds and brush on the right of way of State Highway 45-C extending from Hartford to Hardinsburg. A few minutes before noon, the beginning of the lunch hour, it began to rain and it became apparent that a severe storm was imminent. The foreman told his men to get into the truck used in transporting them to and from their work and go to shelter. Thereupon, in company with the foreman, they repaired to the nearby residence and garage of one Charley Baxley. On arriving at their destination, Fuqua and two other men went into the garage, the foreman and another remained in the cab of the truck, and three of them went to the porch of the house. Fuqua sat down with his back to a plank leaning against the wall. Immediately lightning struck the garage and the plank against which Fuqua was leaning, killing him almost instantly.

In due course appellant presented her claim for compensation to the Board which disallowed it on the ground that the cause of death had no relation to the employment. The Circuit Court, on appeal from the finding of the Board, affirmed the ruling, and from that judgment this appeal is prosecuted.

We see no way to escape the conclusion that the judgment must be affirmed under the principles enunciated in the case of Lexington Railway System et al. v. True, 276 Ky. 446, 124 S.W. 2d 467, 468. There, a motorman, while operating a street car, was killed by a bullet fired by a boy who had found a rifle and was wandering around shooting at different objects. We said: "To be within the Compensation Act by virtue of this provision, the accident must be one 'arising out of his employment' and must have had its origin in some risk of the employment. There must be a causal relation between the employment and the accident. It is not enough that the injured person was at the place of the accident because of his employment unless the injury is the result of some risk peculiar to the employment. The injury must be incidental to the nature of the employment. If the injury occurred by reason of some cause having no relation to the employment, it cannot be said to 'arise out of the employment.' "

Many authorities from other states holding that death by lightning is compensable under Workmen's Compensation Acts are cited by counsel for appellant, but there is no necessity for discussing them, since the principles involved were fully considered in the recent case of Stout v. Elkhorn Coal Co. et al., 289 Ky. 736, 160 S.W.2d 31. In that case we approved the majority rule that if the employment exposes the servant to peculiar danger and risk of being struck by lightning, greater than that to which others of the public are exposed, and he is struck while in the discharge of his duties, he may recover compensation under statutes requiring that his injuries must arise out of his employment in order to be compensable. There, we directed an award, since the proof showed that a crack in the earth had served as a conduit for the lightning to the roof of the room in a mine in which the victim was working. But the negation of the present appellant's asserted right of recovery is implicit in the decision last referred to. Here, the place where the decedent was killed was chosen by him as a shelter during a storm occurring during his lunch hour, and, of controlling importance, there was no evi-

dence that there was a greater likelihood of his being struck in the garage than in the truck, on the porch, in the house, or on the road.

Judgment affirmed.

BURTON v. BOARD OF EDUCATION OF BOROUGH OF VERONA.

New Jersey Department of Labor—Workmen's Compensation Bureau, 1943.
21 N.J.Misc. 108, 31 A.2d 337.

WEGNER, Deputy Commissioner. The case sub judice presents an issue of novel impression since a diligent search fails to reveal to date a reported decision analogous to the facts herein contained. It involves primarily the question of whether or not a school teacher injured in connection with a national rationing program can claim compensation from the Board of Education by whom she is legally employed.

The facts, as adduced before me, indicate that the petitioner had been employed for a great many years as a teacher of English in the high school operated by the Board of Education of the Borough of Verona. * * *

On May 12, 1942, she passed her immediate superior, Mr. Sampson, the principal of the high school, on the stairs in the school at which time he is quoted as saying, "We will need you on gas rationing tonight. The assignments are on the Bulletin Board." An examination of the Bulletin Board notice (exhibit P-3) disclosed her name listed with various other teachers as well as ten or more lay people, the parents of pupils in the school system. These names were variously allocated for various periods of time under certain named schools, the petitioner being listed under Brookdale Avenue School 5:30 to 9. She reported at Brookdale Avenue School, which incidentally was not the school at which she was regularly employed, and after assisting in the gasoline rationing registration left the premises about 9 p.m. and while proceeding down some outside steps leading to a driveway fell and fractured her right ankle. This, she claims, constituted a compensable accident. * * *

The activity in which she was engaged when the accident occurred was not one related to teaching or any related subject

matter coming within the broad, general purpose for which the respondent was organized. It had its inception in one of the many national defense activities which have developed as necessary since Pearl Harbor. * * *

Despite the protestations of the petitioner and her witnesses to the contrary, I am constrained to the conclusions that the activities of the petitioner on the occasion of her accident were in no wise contemplated as incidental to her employment; did not belong to and were not connected with that which she was obliged to do or called upon to do in order to fulfill her contract of hire; that it was not in extra-curricular activity as a teacher but was a voluntary, patriotic undertaking accepted as a duty by all who participated whether teachers or lay people, a duty not to the Board of Education of the Borough of Verona, but a duty as citizens of the United States of America. * * *

Having concluded that the petitioner was not injured in an accident which arose out of, during, and in the course of her employment with the respondent, it is ordered that the petition be and the same is hereby dismissed.

Judgment to be entered in favor of the respondent.

GEORGE S. MEPHAM & CO. v. INDUSTRIAL COMMISSION
et al.

Supreme Court of Illinois, 1919. 289 Ill. 484, 124 N.E. 540.

THOMPSON, J. * * * Defendant in error conducted a paint factory in East St. Louis, Illinois. Deceased operated two paint mixers, known in the trade as "chasers." The two chasers operated by deceased were on the south side of the room. * * * On the north side of the room, at the east end, opposite the C-D chaser, was another paint mixer, called a "dry chaser." It was driven by a belt running from the same main shaft. * * * The belt running from the line shaft to the dry mixer broke. It was repaired by the millwright, and the foreman, Jacob Tipton, called August Roberts, the workman who had charge of the dry mixer, and another workman, Chauncey Tipton, to assist him in putting the belt back on the pulley. The foreman stood upon a platform above the heads of these two workmen so that he could

handle the belt on the line shaft. When they got the belt on the pulley it was found that there was a half turn in the belt, and the foreman directed Roberts to get a piece of gas pipe and throw the belt off. Roberts got the pipe, and he and Tipton put it against the belt above their heads and tried to push the belt off but did not succeed. At this instant the deceased, walking from his A-B chaser toward his C-D chaser, approached these men and saw that they were having difficulty in getting the belt off. He walked up to Roberts and took the pipe out of his hand, saying, "Give me that pipe and I will show you how to get that belt off." As soon as the foreman saw what he was about he shouted to him, "Don't do that!" but deceased had gone too far. The belt jerked the pipe into the pulley and deceased was raised off his feet and thrown to the floor. His skull was crushed. * * *

In the instant case deceased was neither required nor expected to assist in adjusting this belt. The foreman had called two men to help and it is apparent no more were needed. It was merely a question of time until the belt would have been adjusted. There was no emergency. The condition of that belt did not affect the part of the work which deceased was employed to do. Deceased here volunteered his services, and before his foreman could command him not to perform the service he had placed himself in such a position that he could not save himself from the injury.
* * *

As it appears from the testimony of the fellow employees of deceased that deceased was volunteering his services and was of his own volition intermeddling with something entirely outside the work for which he was employed, the judgment of the circuit court must be and is affirmed.

Judgment [quashing the award of the Industrial Commission] affirmed.

WEIS PAPER MILL CO. v. INDUSTRIAL COMMISSION et al.

Supreme Court of Illinois, 1920. 293 Ill. 284, 127 N.E. 732.

[Deceased was employed in loading wagons of straw at a stack to be hauled to a mill near by. Frequently it was necessary to wait until a space was cleared in the mill to receive the straw. In such an interval, the day being very warm, the deceased and

two other workmen lay down on a switch track in the shade of a box car. A switch engine came on the track twice a day. While deceased lay on the track, the box car was backed up by an engine and he was killed.]

CARTER, J. * * * This court has said that to recover for an accident under the Workmen's Compensation Act, Laws 1913, p. 335, Smith-Hurd Stats. c. 48, § 138 et seq., it must result from a risk reasonably incidental to the employment; that an accident arises in the course of the employment if it occurs while the employee is doing what a man so employed may reasonably do within a time during which he is employed and at a place where he may reasonably be during that time to do that thing; that an accident arises out of the employment when it is something the risk of which might have been contemplated, by a reasonable person when entering the employment, as incidental to it. A risk is incidental to the employment when it belongs to or is connected with what a workman has to do in fulfilling his contract of service. It may be incidental to the employment when it is either an ordinary risk directly connected with the employment or an extraordinary risk which is only indirectly connected therewith. Dietzen Co. v. Industrial Board, 279 Ill. 11, 116 N.E. 684, Ann. Cas. 1918B, 764. * * *

Where a ship's engineer in an intensely cold place rigged up a temporary stove to warm his cabin, though he was told during the day-time by his superior officer that it was dangerous and warned not to use it at night, it was held that it was reasonably necessary to have his cabin heated, at night, and the engineer having been asphyxiated at night it was held the accident arose out of the employment. Edmunds v. Owners of Steamship Peterson, 5 B.W.C.C. 157.

Where an employee, after having worked outside in wintry weather for several hours, came into a building and while awaiting an opportunity to use a freight elevator to carry up beef for his employer sat down in front of the fire box of the boiler and fell asleep and a few minutes after was awakened by finding his greasy clothing on fire, it was held that upon these facts the arbitrator or commissioner properly found that the injury arose out of the employment. Richards v. Indianapolis Abattoir Co., 92 Conn. 274, 102 A. 604.

In a plant manufacturing iron briquettes the injured employee was engaged in dumping cars loaded with briquettes as they came out of the plant—one car about every fifteen minutes—and had intervals of rest between unloading them. A car loaded with warm briquettes came out of the plant and he blocked it and sat or lay down on the track to get warm from the heat of the briquettes, the night being very cold, and while lying there or while picking up the briquettes in a recumbent position after getting warm he was caught and injured by the next loaded car. It was held that he was entitled to recover. Northwestern Iron Co. v. Industrial Com., 160 Wis. 633, 152 N.W. 416.

An employee working during the night shift ate his supper, for the sake of warmth, while seated on a tank in the pump room. His employers had provided a dining room for the workmen, but they were not bound to take their meals there. In getting off the tank this employee fell through an aperture in the tank and was scalded, receiving injuries from which he died. It was held that the accident did not arise out of the employment. Brice v. Lloyd, 2 B.W.C.C. 26. * * *

A city employee doing teaming for the city with his own horses and cart, during the noon hour of the day on which he had been hauling coal from a pile near a railroad sat down to eat his lunch on the railroad track when another car struck the car against which he was leaning, causing it to "kick." It was held he was not injured in the course of his employment and could not recover from the city under the Compensation Act; that he incurred "a danger of his own choosing and one altogether outside of any reasonable exercise of his employment." Haggard's Case, 234 Mass. 330, 125 N.E. 565.

To recover on the ground that an accident arose out of employment, under the authorities it must be held that what the employee was doing was reasonably incident to the employment. He must not unnecessarily increase the risk of injury to himself, and so the risk of liability of his master, beyond that contemplated in his contract of employment. He may not choose an unnecessarily dangerous place for the doing of such things, nor may he do them in an unnecessarily dangerous way. 25 Harvard Law Review, 411, and cases cited. It would hardly be considered as a reasonable incident of the employment that an employee, in the interval of rest between the loading of two wagons, would lie

down on the switch track in the shade of a box car, and run the risk of going to sleep, when the track was known to be used by switch engines during the day; and it does not materially affect this conclusion that at the time Klosing lay down on the tracks, and before he went to sleep, two of his fellow employees were near him, though we conclude from the record that they had left before the car was backed. This case differs in its facts materially from that of Northwestern Iron Co. v. Industrial Com., *supra*, where the duties of the injured employee required him to be working continuously in and around the tracks and the cars by which he was injured. Here the employee's duties did not so require. He could have rested, if he desired, during the interval between the loading of the wagons in the shade of the strawstack or in the shed where some of his clothes were, but he chose, for his own convenience, an unreasonably dangerous place, thus exposing himself to a wholly unnecessary risk. We cannot hold that there would be a reasonable implication in the contract of employment that this employee might rest in such a dangerous place during the interval between his periods of actual work in loading wagons.

The judgment of the circuit court will therefore be reversed.

Judgment reversed.

(2) INJURIES OFF THE PREMISES OF THE EMPLOYER

As a general rule, it may be stated that where an injury is incurred by an employee at a place unreasonably distant from the area of service and at a time when the employee is motivated solely by a purpose to serve his own interests, such injury does not arise "out of and in the course of" the employment so as to make the employer liable to pay compensation.

MUELLER CONST. CO. v. INDUSTRIAL BOARD OF ILLINOIS et al.

Supreme Court of Illinois, 1918.
283 Ill. 148, 118 N.E. 1028, L.R.A.1918F, 891, Ann.Cas.1918E, 808.

[Writ of error to the circuit court of Cook county to review a judgment affirming an award under the Workmen's Compensation Act.]

tion Act, Laws 1913, p. 335, Smith-Hurd Stats. c. 48, § 138 et seq., for injuries received by a foreman in charge of repairs upon a cathedral by being struck by an automobile when crossing the street on his way from the cathedral to a near-by saloon for the purpose of telephoning to a lumber company for materials needed that day. The foreman had personally and by his men used this telephone on previous occasions in connection with the work of repairs, and his employer had allowed the telephone charges as items in the expense account. The foreman was paid by the hour, beginning at 8 in the morning, but he customarily reached the cathedral before 8 to make preparations for the day's work. On the day of the accident he reached the cathedral at about 7:30 and the accident happened before 8.]

CRAIG, J. * * * The statute makes the employer liable for all accidental injuries sustained, "arising out of and in the course of the employment." The words "arising out of" and the words "in the course of" are used conjunctively. In order to satisfy the statute both conditions must concur. It is not sufficient that the accident occur in the course of the employment, but the causative danger must also arise out of it. The words "arising out of" refer to the origin or cause of the accident and are descriptive of its character, while the words "in the course of" refer to the time, place and circumstances under which the accident takes place. *Fitzgerald v. Clarke & Sons*, 1 B.W.C.C. 197; *Dietzen Co. v. Industrial Board*, 279 Ill. 11, 116 N.E. 684, Ann. Cas. 1918B, 764. By the use of these words it was not the intention of the Legislature to make the employer an insurer against all accidental injuries which might happen to an employee while in the course of the employment, but only for such injuries arising from or growing out of the risks peculiar to the nature of the work in the scope of the workman's employment or incidental to such employment, and accidents in which it is possible to trace the injury to some risk or hazard to which the employee is exposed in a special degree by reason of such employment. Risks to which all persons similarly situated are equally exposed and not traceable in some special degree to the particular employment are excluded. * * *

The question is, then: Did the circumstances of the employment of the defendant in error require him to incur some special risk in using the street in the way he did? If so, no matter how

slight, it cannot be said that no greater danger was imposed upon him than upon an ordinary member of the public. Under the decisions, if the plaintiff in error had employed a messenger to run errands for the foreman in charge of the work on the cathedral, to answer telephone calls and send messages by telephone, there could be no question but that he could recover if he were injured in the same manner that the defendant in error was injured.

* * *

While it is undoubtedly true that the danger or liability of injury would have been greater if the nature of the employment of defendant in error had required him to cross the street several times a day, such liability would be one of degree, only. If, as a part of his duties, he was required to cross the public street for the purpose of telephoning on the business of his employer and while so doing was struck by a passing vehicle, we are unable to see why under the facts of this case, such an accident does not arise out of his employment as well as in the course of his employment. He was injured in performing a regular duty that was expected of him. It can be readily inferred from the evidence that it was part of his duties to supervise the delivery of material to the building, and that in so doing it was necessary to be on the adjacent streets to direct where such material should be deposited or brought on the premises. Had the accident occurred while he was so engaged, it would have been substantially the same, in legal effect. * * *

Judgment affirmed.

R. J. ALLISON, Inc., v. BOLING.

Supreme Court of Oklahoma, 1943. 192 Okl. 213, 134 P.2d 980.

HURST, J. * * * Petitioner, R. J. Allison, Inc., was engaged in the trucking business. Respondent, Boling, was an automobile mechanic in its employ. His regular working hours were from 8 A. M. to 6 P. M. He was paid an hourly wage of sixty cents, and the time for which he was paid began when he punched the clock going in, and ended when he punched it going out of, petitioner's place of business. Boling lived about a mile and a half from the place of business and usually walked to and from his work on the public highway. On July 1, 1941, after his regular work had

ceased for the day and he had reached home for the night he was called by C. L. Smith, who was in charge of petitioner's business in the absence of R. J. Allison, and asked to return to the place of business and repair a truck that had to be sent out by 2 A. M. the next day. Boling testified that he told Smith that he was tired and that he had no means of transportation but would do the work if he would take him to the place of work and bring him home after he had finished, to which, he testified, Smith agreed. Smith denied that he agreed to transport him, but admitted he in fact took him to the place where the work was done. Boling did the special work, commencing at 8 P. M. and finishing at 11 P. M. Smith did not return or send any one to take him home. After waiting a few minutes and deciding he was not going to be given transportation home, he started walking home. As he was walking along the highway that he usually traveled, and which he would have traveled if the agreement to transport him home had been observed, he was run into by a drunken motorist and received the injuries complained of. The trial commissioner made an award against the employer and its insurance carrier, which was affirmed on appeal by the State Industrial Commission.

Petitioners and respondent agree that the general rule, sometimes referred to as the "going and coming rule", is that an injury suffered by an employee in going to or returning from his regular place of work does not arise "out of and in the course of his employment" so as to be compensable under the Workmen's Compensation Law. 85 Okl.St.Ann. § 1 et seq. See Indian Territory Illuminating Oil Co. v. Gore, 152 Okl. 269, 4 P.2d 690; Southern Surety Co. v. Cline, 149 Okl. 27, 299 P. 139; 71 C.J. 712; 28 R.C.L. 804. Petitioners insist that this general rule applies here. Respondent contends that this case is not governed by the general rule (1) because at the time he was injured he was returning from performing a special task, outside his usual working hours, at the request of his employer, and (2) because he was promised transportation to and from his place of work. He urges that under these exceptions to the general rule his employment began when he left home and did not cease until he returned home.

The expression "arising out of and in the course of his employment" is found in many of the Workmen's Compensation Stat-

utes. The difficulty the courts have had in determining what it means and in applying it to varying circumstances may be seen by examining 28 R.C.L. 796-804 and 71 C.J. 642-661, and the footnotes thereto. It seems to be agreed that the expressions "arising out of" and "in the course of" are not synonymous, the first referring to the origin or cause of the accident and the second to the time, place, and circumstances under which it occurred. Oklahoma Gas & Electric Co. v. Stout, 179 Okl. 312, 65 P.2d 477; 28 R.C.L. 797; 71 C.J. 644. The first refers to causal connection. Under it "the act being performed by the workman at the time of his injury must be part of the duty he was employed to perform or must be reasonably incidental thereto." 71 C.J. 652. See also Stanolind Pipe Line Co. v. Davis, 173 Okl. 190, 47 P.2d 163. The second requirement is fulfilled when the accident "occurs within the period of his employment, at a place where he may reasonably be, and while he is reasonably fulfilling the duties of his employment or engaged in doing something incidental to it." 71 C.J. 659. See also Stanolind Pipe Line Co. v. Davis, above, and Oklahoma Gas & Electric Co. v. Stout, above.

* * *

The general rule that injuries received by an employee while going to or coming from work are not compensable seems to be based upon the fact that the employment generally begins and ends when the work begins and ends. That there are exceptions to this rule is clear. In *Bountiful Brick Co. v. Giles*, 276 U.S. 154, 48 S.Ct. 221, 222, 72 L.Ed. 507, 66 A.L.R. 1402, it is said that "the employment may begin in point of time before the work is entered upon and in point of space before the place when the work is to be done is reached." See also *Voehl v. Indemnity Ins. Co.*, 288 U.S. 162, 53 S.Ct. 380, 77 L.Ed. 676, 87 A.L.R. 245. This principle was recognized by this court in *Sapulpa Ref. Co. v. State Industrial Commission*, 91 Okl. 53, 215 P. 933, where, by agreement, the time of service ran while the employee was going to and from his work.

Bearing in mind these general principles, we now examine the contentions of the parties.

1. In support of the first exception petitioner cites *State Compensation Ins. Fund v. Industrial Acc. Commissioner of Cal.* 89 Cal.App. 197, 264 P. 514, *Kyle v. Greene High School*, 208 Iowa 1037, 226 N.W. 71, and *Bocock v. State Board of Education*,

55 Idaho 18, 37 P.2d 232. We think these cases support the argument of petitioner. They involved the Workmen's Compensation Laws of California, Iowa and Idaho, and the facts are very similar to those in the instant case. In the California case the employee was returning home after performing a special task, and in the other cases he was on his way from his home to perform a special task. In each case it was held that the injury arose out of and in the course of the employment. It is clear that the sole reason for Boling's trip was to perform a special task at the request of his employer. The trip to and from the place where the work was performed was a necessary incident to the work of repairing the truck. [Citations omitted.]

2. While there is some conflict in the evidence as to whether the employer agreed to furnish transportation to and from the place of work, we believe the State Industrial Commission was justified in finding, and we accordingly assume, that the agreement was made. The general rule, first above stated, does not apply where the employer agrees to, and does, furnish transportation to and from the place of work, as an incident of the employment, and this despite the fact that wages are not paid while the employee is going to and from the place of work. *McGeorge Corporation v. State Industrial Commission*, 180 Okl. 346, 69 P. 2d 320. See also *Cary v. State Industrial Commission*, 147 Okl. 162, 296 P. 385; *Ford v. Holt*, 191 Okl. 534, 131 P.2d 67; 87 A.L.R. 250, note. And since the exception is based upon the fact of the agreement, it is not material that the employer here violated the agreement.

The two exceptions, above discussed, are in harmony with the rule that street or highway accidents are covered by the Workmen's Compensation Law when the employment requires the employee to be upon the street or highway, such as deliverymen, messengers, draymen, and the like. [Citations omitted.]

We conclude that under the two stated exceptions, the employment commenced when the trip to the place of work started and was not to cease until the return trip had been completed. And in such case "the hazards of the journey may properly be regarded as hazards of the service, and hence within the purview of the Compensation Act." *Voehl v. Indemnity Insurance Co.* [288 U.S. 162, 53 S.Ct. 383, 77 L.Ed. 676], above.

It follows that at the time Boling suffered the injuries complained of he was in the employ of R. J. Allison, Inc., and his injuries arose both "out of" and "in the course of" his employment.

Award sustained.

WESTERN PIPE & STEEL CO. v. INDUSTRIAL COMMISSION

District Court of Appeal, First District, Division 1, California, 1942.
49 Cal.App.2d 108, 121 P.2d 35.

PETERS, Presiding Justice. By this review proceeding petitioner, Western Pipe and Steel Co. of California, seeks to annul a death benefit award made by the Industrial Accident Commission in favor of the widow of John H. Henderson. Henderson was employed by petitioner at the time of his death. It is urged by petitioner that the death of Henderson did not arise out of, nor did it occur in the course of, Henderson's employment.

The facts are not substantially in dispute and are as follows: The decedent was employed as a shipwright-carpenter at the shipyards of petitioner. His regular hours of work were from 8 a. m. to 4:30 p. m., with half an hour off for lunch. Employees were frequently required to work overtime because part of their work had to be adjusted to the tides. When they did work overtime they would work from 4:30 p. m., their normal quitting time, to 8:30 p. m., and would receive compensation for these four hours at a rate stated by petitioner to be double their regular hourly wage. Under the arrangement with petitioner the employees were permitted to take half an hour off for dinner during the four-hour overtime period, and the company paid them during this dinner period at the double time rate. The employees took this half hour for dinner at no set time, but whenever the employee in charge found it most convenient. The company maintained a cafeteria on its premises for the convenience of its employees. If employees ate at the cafeteria the meals were paid for by the employees. The employees were free to eat elsewhere if they desired.

A fellow employee of decedent testified that on the evening in question the cafeteria was closed at the period when decedent took time off for dinner. He communicated this fact to decedent shortly before 6 p. m. The decedent determined to eat at a

restaurant in nearby South San Francisco. He, thereupon left in his automobile for the purpose of securing his dinner. While on this errand, and apparently while crossing the street after parking his car, he was struck by an unidentified passing motorist, and was injured so severely that he died a short time thereafter.

The commission found, and in support of its holding urges, that the death arose out of, and in the course of, the employment. The petitioner contends that the law is well-settled that an employer is not responsible for the act of, or injury to, an employee while the latter is off the premises for the purpose of securing his personal meals. There are many cases holding that injuries received by an employee while on his way to or from meals are normally not compensable. [Citations omitted.]

The basis of some of the cases which deny the employee compensation for injuries received while going to or from meals is that while the employee is on such an errand he is not rendering any service for his employer. Other cases recognize that this is merely one part of the so-called "going or coming" rule—i. e., that injuries received while going to or coming from work normally do not arise out of, nor occur in the course of, the employment. There are, of course, many exceptions to both rules. It is not indispensable to recovery that at the time of the injury an employee must be rendering service to his employer. Acts of the employee for his personal comfort and convenience while at work, such as taking a drink of water, lighting a cigarette, warming himself, etc., do not interrupt the continuity of the employment. This exception is not limited to acts performed on the employer's premises. In *Western Pac. R. R. Co. v. Industrial Acc. Comm.*, 193 Cal. 413, 224 P. 754, a messenger was struck by an automobile while returning on his bicycle to his place of employment from his home where he had gone to get his raincoat when a storm came up while he was outside performing service for his employer. The injury was held compensable. * * *

There are also many exceptions to the "going and coming" rule. These exceptions need not be summarized here except to point out that in two recent decisions the Supreme Court has considerably broadened the scope of such exceptions. *Freire v. Matson Navigation Co.*, 19 Cal.2d 8, 118 P.2d 809; *Smith v. Industrial Acc. Comm.*, 18 Cal.2d 843, 118 P.2d 6.

Although the above cases have only an indirect bearing on the specific problem involved in this proceeding, they do demonstrate that the "going and coming" rule, and the rule that the employee must be rendering service for the employer at the time of injury are not of inevitable application. The cases cited by petitioner certainly establish that injuries received while going to or coming from meals are normally not compensable. None of the cases cited, however, involved a factual and legal situation comparable to that involved in the instant case. Here we have an employee whose normal day's work would terminate at 4:30 p. m. When he came to work in the morning he had no way of knowing whether or not he would be asked to work overtime that night, so that it was impossible to plan for his dinner. When he worked overtime, as he did on the night of his death, the overtime period started at 4:30 p. m., his normal quitting time, and continued to 8:30 p. m. He was paid double his normal hourly wage during this four-hour period. The employer apparently realized that men could not be expected to work at their highest efficiency without food during this overtime period, and for that reason agreed that they should have half an hour off for the purpose of securing their dinner. As already pointed out, normally when employees are going to or from their meals they are not rendering a service to their employers and for that reason injuries received during those periods are not compensable. But, of course, the employer may expressly or impliedly agree that service shall continue during the period the employee is going to or coming from his meals taken off the premises. When the employer pays the employee at an hourly rate during his meal hours, especially when those meals are taken during an overtime period, it seems to be, and is a reasonable inference, that by such an arrangement the employer has impliedly agreed that service will continue during such period.

This is not a new or novel concept. The problem has frequently been presented in connection with cases where the employee's compensation covers the time he is going to or coming from work. In such situations the courts have quite uniformly held that injuries received while going to or from work are compensable. The problem is discussed in an annotation appearing in 87 A. L.R. 250 entitled: "Right to compensation for injury while going to or from work as affected by fact that compensation covers

the time involved or cost of transportation, or both." It is there stated:

"It is a general though not invariable rule, so common as to require no citation of authority, that an injury sustained in going to or from work does not arise out of and in the course of the employment within the meaning of workmen's compensation acts.

"An exception to this rule, however, is generally recognized where the employee's compensation covers the time involved in going to or from his work, or an allowance is made for the cost of transportation."

Many cases are then discussed. Running through the cases is the thought that by agreeing to pay the employee from the time he leaves home until the time he returns, the employer has agreed that the employment shall be continuous during such period. The courts frequently emphasize that such rule has special application to cases where the employee is required to work extra hours. * * *

Obviously, if an employee is deemed to be acting in the course of his employment in going to or coming from his work when his compensation covers that time, it would seem clear that he is likewise acting within the course of his employment when his hourly wage continues during the time he is permitted to eat lunch or dinner off the premises. Certainly it can at least be said that, when the employee is required to work overtime immediately after his normal period of work, and such overtime period includes the normal eating period, and the employer agrees that employee may eat off the premises and shall be paid during the period, the finder of the fact is justified in inferring that by such arrangement the employer has impliedly agreed that the employment shall continue and that the employee shall be deemed to be rendering service during such period. * * *

For the foregoing reasons the award is affirmed.

PARK UTAH CONSOL. MINES v. INDUSTRIAL COMMISSION

Supreme Court of Utah, 1943. 103 Utah 64, 133 P.2d 314.

MCDONOUGH, J. The plaintiffs by writ of review seek to annul an award made by the Industrial Commission in favor of Wil-

liam L. McMichael, who slipped and fell while leaving work to return home on the afternoon of December 21, 1941, and from which fall he sustained injuries. The plaintiffs admit that the following statement of facts in the findings and decision of the Industrial Commission correctly reflects the evidence relative to the facts so found: "Applicant had finished his shift, changed clothing and was on his way to the parked automobile of co-worker with whom he rode to and from work. The surface structures of the employer's property are built in the shape of the letter 'U', with the open side facing a narrow oiled road, which is maintained by the county. The yard formed by the buildings and the road is about fifty feet square. Applicant crossed the yard and stepped over the edge of the property line into the road. He reached a point approximately two paces beyond the property line when he slipped on the ice and snow, fell to the ground and broke his ankle. At the point of the fall, the road slopes downhill in the direction applicant was walking at about a three per cent fall. That yard and road were covered by a fresh fall of snow about eight inches in depth. The car, which was applicant's objective, was parked on the road opposite the shop, and about fifty feet down the road from the point of the accident. Although the employer had provided a parking lot about five hundred feet lower down the road, it was customary for employees to park along the side of the shop. The employer apparently consented to this arrangement." * * *

Plaintiffs challenge the award made by the Industrial Commission for the reason the point at which applicant actually slipped is about 4 feet off the company property. They contend that the applicant was within the boundaries of the public highway when he slipped and fell, and that he was subject to the same hazards which the general public face on a public street or highway; and consequently, that this case comes within the general rule that no compensation can be allowed for an injury sustained by an employee traveling to or from work on a public street or highway. The applicant and the Industrial Commission argue, on the contrary, that the case is within the exception to the rule, being governed by the rules laid down in Cudahy Packing Co. v. Industrial Comm., 60 Utah 161, 207 P. 148, 28 A.L.R. 1394; Cudahy Packing Co. v. Parramore, 263 U.S. 418, 44 S.Ct. 153, 155, 68 L.Ed. 366, 30 A.L.R. 532.

In the Cudahy Packing Company case, the employee was killed while crossing a railroad track 100 feet from the property of his employer. He was traveling in an automobile on a road leading to the packing plant which crossed the railroad right-of-way. The Industrial Commission granted an award, and the company applied to this court for review. The employer contended decedent sustained his fatal injuries while on his way to work, at a place not under the control of the employer and at a time when the relation of employer and employee did not exist. It was also urged that the road on which he traveled was a public road, and that he was not exposed to any other or greater risk or danger than any member of the general public traveling over such road. In upholding the award this court held that while the accident occurred off company property and by means entirely beyond the control of the employer, the public road with the particular railroad crossing was the only means of approach to the plant, and being without any option or election of some other access to the plant, the danger incident to the crossing of the tracks in close proximity to the plant involved employees in a peculiar and abnormal exposure to perils. * * *

We believe the decision of this case must be controlled by the case of Cudahy Packing Co. v. Industrial Comm., supra. We do not think the principle upon which the case was ruled justifies limiting the hazard to a railroad crossing or right-of-way adjacent to the premises of the employer. The facts of this case come within the exception to the rule that there can be no workmen's compensation for an accident sustained going to or from work. The general rule is predicated upon the fact that the employee selects the particular way, means and conveyance for going to and from work.

When the employee arrives at the threshold of his employment and the means for entrance are limited so that he has no choice as to the mode of entrance, all of the hazards which are peculiar to such entrance attach to his employment. The converse is equally true as to leaving the employment. The employee in this case had only one means of exit from the premises.
* * *

The accident arose in the course of the employment, and the award entered by the Industrial Commission is affirmed.

(3) VIOLATION OF RULES BY EMPLOYEE

Violation of rules or orders by an employee will not of itself take him out of the employment. There must be, in addition to such violation, a clear departure from the area of service, either in time or space or purpose or duty undertaken.

It is always a complete answer to the contention that violation of rules takes the employee out of the employment, to show that the rule had not in the past been enforced by the employer.

It will perhaps be apparent by this time that the problem of when an injury arises out of and in the course of the employment differs materially from the "scope of employment" problem in Agency. In that situation the attempt is to fix liability on the employer for wrongs done to third parties by the servant. There the mere fact that the servant violated his master's instructions to proceed with care amounted only to a breach of duty to his master but left the master liable to the third party.

Here the attempt is to fix liability on the employer for an injury suffered by the servant himself. The requisite is that it was the employment which caused the injury, and that the servant was performing his authorized duties. If performing unauthorized duties, in violation of orders, he is not in the employment even though he was at the time attempting to serve his master in doing something he was not employed to do.

GARRAHAN v. GLEN ALDEN COAL CO.

Superior Court of Pennsylvania, 1942. 149 Pa.Super. 1, 26 A.2d 138.

RHODES, J. The material question in this workman's compensation case now is whether "deceased was traveling in the slope instead of the manway, at the time he was injured, in violation of the positive orders of defendant, and consequently not in the course of his employment." * * *

The referee, having found that deceased's presence at the point where he was discovered was in violation of positive orders of defendant, denied compensation on the ground that deceased did not receive his fatal injury in the course of his employment.

* * *

As was said in the Dickey case, *supra*, 297 Pa. 172, at page 176, 146 A. 543, at page 545: "Here the servant was directed to take a definite way built for that purpose. He followed this course repeatedly, as instructed to do; not once, but often. On this [occasion], in defiance of these positive orders, he left the way, took [another which he had been ordered not to use], and as a consequence was killed in the attempt. Here was a plain violation of positive instructions. It concerned a matter designed for the safety and protection of employees. He had no duty to perform on the place of the accident or the instrumentality that killed him, nor did his work bring him in any manner in contact with them; as to these he was a stranger. To sustain a different theory would weaken the beneficial effect of the law, take from the employer all opportunity to guard against accident, and make discipline in a plant merely a thing of words only. Where an employee violates a positive rule as to entering forbidden parts of the owner's premises about which he has no duty to perform, or disobeys instructions against starting machinery or other dangerous agencies with which his work is not connected, and with which he has no business, and an injury results, he not only violates the orders of his employer, but is in the position of a trespasser, who without right, authority, or permission enters forbidden ground."

Judgment is affirmed.

SCOTT v. PAYNE BROS., Inc.

Supreme Court of New Jersey, 1914. 85 N.J.L. 446, 89 A. 927.

Under the Workmen's Compensation Act of 1911, P.L. p. 134, N.J.S.A. 34:15-1 et seq., the petitioner was employed for an indefinite period at \$5 per day to work on a contract for the erection of a structural steel building. He had been working a week when the injury happened. "Scott with two others were pulling on a hand chain connected with a block for the purpose of operating a mechanism which caused a lifting chain to pass through the block and lift a steel girder. In some way, the lifting chain became clogged, probably by the turning or twisting of one of the links, and by being forced through the block it split the block, and Scott, who was sitting with his face with-

in a few inches of the side of the steel block, was struck on the forehead and received a laceration." The statement is quoted from defendant's brief.

SWAYZE, J. This was not a case of casual employment. The petitioner was employed in the regular business of the defendant, and likely to be retained for some time, and as long as the work remained unfinished. It was not a mere temporary, accidental employment.

The injury was due to an accident arising out of and in the course of his employment. That employment was as a structural steel worker upon the building in course of erection; the lifting of the steel girder was a necessary part of the work; the defendant was liable to be called on, as he was, to assist. The suggestion to the contrary is that the men who were pulling continued to do so, although the foreman told them to stop; and the argument is that this disobedience of orders involves the conclusion that what followed was not in the course of the employment. Scott says he did not hear the order to stop, and the judge so found. The case therefore does not involve an accident happening to a petitioner by reason of his own disobedience. We see no reason to doubt that a disobedience of orders by his fellow workmen is as much one of the risks of the employment as a defect in the appliances. The accident, whether due to one cause or the other, was one of the risks which might have been contemplated by a reasonable person as incidental to the employment; it occurred while Scott was doing what he might reasonably do at that time and place. *Bryant v. Fissell*, 86 A. 458. We cannot accede to the suggestion of the defendant that disobedience of a specific order to stop work ends the employment for the time being. The man does not cease to be an employee because at certain instants of time he is not actually engaged in work. Employment within the meaning of the statute refers rather to the contract than to the labor done in pursuance of the contract. * * *

[The award of compensation is affirmed.]

WEST SIDE COAL & MINING CO. v. INDUSTRIAL COMMISSION et al.

Supreme Court of Illinois, 1920. 291 Ill. 301, 126 N.E. 218.

DUNCAN, J. * * * The deceased was employed by plaintiff in error at its mine as a rock and slate picker. His principal duties were to pick out the rock and slate from the coal as it passed through a chute leading from the coal mine to the railroad cars upon which it was being loaded. His location while performing that duty was on a seat at the top of the coal chute. * * * The deceased left his seat and went down and removed some of the blocks or sprags under the car so that the car might move further down the incline and fill with coal at its other end. This car was an extra wide car, and by reason thereof, while the car was moving down the incline, the deceased's head was caught between an upright or post of the coal chute and a standard of the coal car. His head was thus crushed and he died a short time thereafter.

There is no dispute about the facts. The deceased was not engaged in any part of his duty, under the evidence, at the time of the accident but was engaged in an act that he had been told not to do. It cannot be said, therefore, that his death arose out of and in the course of his employment. Dietzen Co. v. Industrial Board, 279 Ill. 11, 116 N.E. 684, Ann.Cas.1918B, 764; Central Garage v. Industrial Com., 286 Ill. 291, 121 N.E. 587; Rainford v. Chicago City Railway Co., 289 Ill. 427, 124 N.E. 643.

It is contended by plaintiff in error that the top foreman saw the deceased on the ground just after he had taken the blocks or sprags from under the car and that he did not then warn or tell him not to engage in that work. The car was already then moving, and while the foreman perhaps knew that deceased had removed the sprags, he was several feet away from him and it does not appear that a warning at that time would have saved the deceased.

As the deceased was not within the scope of his employment at the time of his injury the Industrial Commission had no jurisdiction to make an award for compensation. It is our duty to consider the evidence in the record which determines the ques-

tion of jurisdiction. That evidence clearly shows that the deceased was outside of the scope of his employment and was not engaged in any duty for which he was employed or in any work incident thereto.

The judgment of the circuit court is affirmed.

Judgment affirmed.⁴

⁴ In Dietzen Co. v. Industrial Commission, 279 Ill. 11, 116 N.E. 684, Ann. Cas. 1918B, 764 (1917), a workman employed to polish small pieces of metal at a machine accidentally dropped one of them into an exhaust pipe, not a part of his machine, and against previous orders put his hand into the pipe to recover the piece of metal, and so brought it into contact with the exhaust fan. It was held that the injury did not arise out of the employment. Carter, J., referred to other cases as follows: "A boy who had charge of the handle of a machine lifted off the cover over some pinion wheels and played with them, with the result that his hand was caught in the wheels and the end of one of his fingers was torn off. He had orders not to lift the cover or touch the pinion wheels. It was held that the accident did not arise out of and in the course of his employment. Furniss v. Gartside & Co., 3 B.W.C.C. 411 (1910). A boy employed in a spinning mill injured himself while cleaning the machinery when it was in motion. He was not employed to clean the machinery, and it was held that the accident did not arise out of the employment. Naylor v. Musgrave Spinning Co., 4 B.W.C.C. 286 (1911). A lad fourteen years of age was employed as a bobbin boy at a spinning mill. His duty was to take off the bobbins and he had been fully

instructed for the work. While the machine was in motion he attempted to put on some weights which had fallen off, and was injured. The duty of putting on weights belonged to men employed for that purpose. It was held that the master was not liable for the injuries received. Michael v. Henry, 209 Pa. 213, 58 A. 125 (1904). A boy employed in a boot factory, who was directed to take an insole downstairs to have it remolded, and in the absence of the operator of the molding machine attempted to remold it himself and was injured, was held entitled to compensation where he had not been expressly forbidden to touch the molding machine. Tobin v. Hearn, 44 Ir.L.T. 197 (1910). A woman, injured while cleaning a part of the machinery that it was not her duty to clean, was held to have suffered an injury arising out of and in the course of the employment, where she was not expressly forbidden to clean the machinery. Greer v. Thompson, [1912] W.C.C. 272. Authority for a servant to act on an emergency in his master's interest may be implied. Where a workman was injured in attempting to stop his master's runaway horse it was held that the accident arose out of and in the course of the employment although his work was wholly unconnected with the horses. Rees v. Thomas, 68 L.J.Rep. 539 (1899).

(4) HORSEPLAY AND QUARRELS BETWEEN EMPLOYEES

Injuries inflicted or caused by a fellow servant as the result of a quarrel are outside the course of the employment and not compensable where it appears that the disagreement arose over some private matter totally unconnected with the employment. On the other hand, if the disagreement arose about the work, the manner of doing it, interference with the work, or the like, the resultant injury arose out of and in the course of the employment.

PETERSEN'S CASE.

Supreme Court of Maine, 1942. 138 Me. 289, 25 A.2d 240.

THAXTER, J. This workmen's compensation case is before this court on an appeal by the employer and the insurance carrier from a decree awarding compensation to the petitioner.

The facts found by the commissioner may be summarized as follows. The petitioner, while engaged in his regular work, was approached by a fellow employee named Poore, who, in a spirit of horseplay, threw his arms about the petitioner who attempted to free himself. In the scuffle which ensued, both fell to the floor and the petitioner suffered a fracture of the skull. * * *

In the case before us, the commissioner has specifically found that horseplay and fooling were indulged in at the plant of this employer, that the employee, Poore, was a frequent offender, and that these facts were known or should have been known to the officials of the company. Citing numerous authorities, the commissioner ruled, and we think properly, that under such circumstances the injury arose out of the employment. Such holding in no respect violates the principle laid down in Washburn's Case.

This problem was discussed in a recent case. Staubach v. Cities Service Oil Co., 1941, 126 N.J.L. 479, 19 A.2d 882, 883. The plaintiff brought suit under the Death Act, N.J.S.A. 2:47-1, to recover for the death of her husband who was killed through the act of a fellow employee who in fun threw a liquid over him which caught fire from an acetylene torch. The gravamen of the action was, to quote the opinion, "that the company

knew or should have known of the custom of its employees of throwing liquid at each other * * *. The trial judge dismissed the complaint and this ruling was affirmed on the ground that there was an exclusive remedy under the Workmen's Compensation Act. The court said at page 884 of 19 A.2d:

"It is true that an injury resulting from an assault occurring willfully or sportively is not a compensable accident within the meaning of the workmen's compensation act. Hulley v. Moosbrugger, 88 N.J.L. 161, 95 A. 1007, L.R.A.1916C, 1203; Honnold on Workmen's Compensation, Vol. 1(1918) p. 440. It is also equally true that when an employer knows of the occurrence of such assaults in the past and fails to prevent their recurrence, so that a subsequent injury, resulting therefrom, may be said to have followed, in a given case, as a 'natural incident of the work' and to have been such that it would 'have been contemplated by a reasonable person,' then it may be said to have arisen not only in the 'course of' but also 'out of' the employment and to be compensable under the workmen's compensation act."

The doctrine of this case fully supports the ruling of the commissioner in the case now before us and is in accord with the decision of every case called to our attention where a similar question has been considered.

[Citations omitted.]

[Affirmed.]

PEKIN COOPERAGE CO. v. INDUSTRIAL COMMISSION et al.

Supreme Court of Illinois, 1918. 285 Ill. 31, 120 N.E. 530.

DUNN, J. * * * On December 26, 1916, the Pekin Cooperage Company was engaged in the cooperage business in Peoria. Rasor was engaged in picking out or culling barrel staves for another employee, who was known as a "barrel raiser," whose duty it was to make the barrels. George A. Miller was culling staves a few feet from Rasor for another barrel raiser. It was the duty of each culler to cull staves for his barrel raiser, and in case his rack ran out of staves it was customary for the culler to take staves from another culler's rack. Miller had been taken from the half-barrel department and put to culling staves in the afternoon, and had been working about half an hour when

the injury happened. He had taken a half pint bottle of whisky with him to the plant in the morning, from which he had taken two or three drinks, and he had about half the whisky left. Shortly after the injury the superintendent sent Miller home, because he was drinking on the job. Miller had gone to another part of the building a few minutes, and when he returned he took some staves from Rasor's rack and put them in his own. Rasor objected to this in language which was offensive, and a fight ensued, the details of which are clouded in the obscurity which usually attends such occurrences. There is evidence tending to show, and which would justify the conclusion, that Miller was the aggressor throughout, and that Rasor did no more than defend himself. Rasor's claim is for injuries received in this encounter.

Rasor clearly suffered an accidental injury in the course of his employment. It was a sudden and unexpected mishap, occurring outside of the usual course of events, without any design on his part, while he was engaged at his work. The compensation to be provided and paid by the employer under the Workmen's Compensation Act is not, however, for all incidental injuries which may be sustained by his employees in the course of their employment but only for such as also arise out of the employment. There must be some causal relation between the employment and the injury. * * * In Armitage v. London & Western Railway Co., 86 L.T. 883 (a case under the English Workmen's Compensation Act), two boys, fellow workmen of the claimant, were "larking" and one pushed the other into a pit. The latter in anger threw a piece of iron at the former, but missed him and injured the claimant, who was engaged at his work. It was held that the act had no relation to the employment, but was an intentional wrongful act, and was not a risk of the employment. In Baird v. Burley, 45 Scott, L.R. 416, the claimant, who was working in a coal mine, was pursuing a fellow workman to prevent him from carrying off a hutch. The latter threw some rubbish, and the former, in seeking to avoid it, struck his head against the side of the passage. It was held the accident was caused by the act of a fellow workman outside the scope of his employment, and that the claimant was therefore not entitled to compensation. In Murphy v. Berwick, 43 Ir.L.T. 126, a customer came out of the bar of a hotel into the kitchen, which

adjoined it, and made a rush at the cook, who in trying to avoid him threw her hand through a glass door and was injured, and it was held that the accident did not arise out of her employment. In New Jersey it was held that an employee is not entitled to compensation for an injury which was the result of horseplay or skylarking, whether he instigated it or took no part in it. *Hulley v. Moosbrugger*, 88 N.J.L. 161, 95 A. 1007, L.R.A.1916C, 1203. To the same effect is *Pierce v. Boyer-Van Kuran Lumber & Coal Co.*, 99 Neb. 321, 156 N.W. 509, L.R.A.1916D, 970. This is contrary to our decision in the case of *Pekin Cooperage Co. v. Industrial Board*, 277 Ill. 53, 115 N.E. 128. The death of a watchman in a mill, who was killed by a robber who concealed himself for the purpose of robbing the watchman and not the mill, was held not to arise out of his employment. *Walther v. American Paper Co.*, 89 N.J.L. 732, 99 A. 263. On the other hand, in the following cases the injuries have been held to arise out of the employment: Where a premeditated assault was made upon a schoolmaster by unruly pupils, resulting in his death. *Trim Joint School District Board v. Kelly*, [1914] A.C. 667. * * * Where an assault by a fellow workman on the claimant resulted from a struggle over a brush to be used in the work. *McIntyre v. Rodgers & Co.*, 41 Scott.L.R. 107. Where a workman, whose duty it was to take care of the horses which he drove, objected to the amount of cold water which a fellow workman was throwing on the horses in washing them and was injured in a fight growing out of the quarrel. *Heitz v. Ruppert*, 218 N.Y. 148, 112 N.E. 750, L.R.A.1917A, 344. Where a workman was killed while at work by an intoxicated fellow workman, whose condition and habits were known to the superintendent. *In re McNicol*, 215 Mass. 497, 102 N.E. 697, L.R.A.1916A, 306. Where a worker on a railroad section was not doing his work properly, and upon his neglecting to follow the foreman's directions the latter told him to drop his shovel and get his time, but the man refused and the foreman undertook to take his shovel from him and was injured. *Western Indemnity Co. v. Pillsbury*, 170 Cal. 686, 151 P. 398. In *Mueller Construction v. Industrial Board*, 283 Ill. 148, 118 N.E. 1028, L.R.A.1918F, 891, Ann.Cas.1918E, 808, we held that an injury to an employee who was struck and injured by an automobile in going across the street from his working place in the line of his duty, for the

purpose of telephoning orders in furtherance of the business of his employer, arose out of the employment.

Each of the decisions cited was rendered upon a consideration of the facts of the particular case. Two cases are seldom precisely alike in their facts. Some, at least, of the cases cited are doubtful, and with the conclusions reached in some of them we do not agree. All concur in the rule that the accident, to be within the Compensation Act must have had its origin in some risk of the employment. No fixed rule to determine what is a risk of the employment has been established. Where men are working together at the same work disagreements may be expected to arise about the work, the manner of doing it, as to the use of tools, interference with one another, and many other details which may be trifling or important. Infirmitiy of temper, or worse, may be expected, and occasionally blows and fighting. Where the disagreement arises out of the employer's work in which two men are engaged and as a result of it one injures the other, it may be inferred that the injury arose out of the employment. The origin of this difficulty was trifling—the taking of a few staves from the claimant's rack, to which he objected, saying, as he testified, that if Miller would stay in there he would be up with the claimant. The dispute was concerning the employer's work in which the men were both engaged, and there is evidence tending to show that the claimant was not responsible for the assault.

The judgment will be affirmed. • • •

CITY OF CHICAGO v. INDUSTRIAL COMMISSION et al.

Supreme Court of Illinois, 1920. 292 Ill. 406, 127 N.E. 49, 15 A.L.R. 586.

DUNN, C. J. John Gallagher, a laborer in the employ of the city of Chicago, was at work on August 3, 1917, loading sand from a freight car into wagons near the municipal pier. He got down from the car and went to a hydrant to get a can of drinking water, with which he returned to the car. A negro named Ramsey was working on an adjoining car and asked Gallagher for a drink, but Gallagher told him to get his own water. Ramsey called him a name and told him to climb on the car and he

would knock his head. Gallagher said nothing, but after standing there for a few minutes climbed upon the car to go on with his work and Ramsey called him a name and struck him on the head with a shovel. Gallagher died as a result of the injury, and the Industrial Commission affirmed a decision of an arbitrator allowing compensation to his widow. * * * The felonious assault which was made upon the deceased was without any excuse. It had no more connection with the work in which he was engaged than if Ramsey had been a loiterer on the street and had asked for a drink from Gallagher's can. There was no causal relation between the work and the assault. The affair was purely personal, with no reference to the employment. Ramsey and Gallagher happened to be at the same place because of their employment, but an injury done by one to the other on account of some purely personal grudge which this proximity gave an opportunity to inflict was not a result of the employment. There was no causal connection between the conditions under which the work was to be done and the injury. The injury was not incidental to the character of the business, but the *deceased would have been equally exposed to it entirely apart from his employment.*

The judgment will be reversed and the award set aside.

Judgment reversed.

SECTION 6.—NOTICE OF ACCIDENT AND CLAIM FOR COMPENSATION

Notice of accident to employer within thirty days, and claim for compensation within six months, are made conditions to recovery in practically all workmen's compensation statutes.

Nearly all of the compensation statutes provide that no suit for compensation may be maintained unless the employer has had notice of the accident within thirty days of its occurrence, and unless claim for compensation has been made to the employer within six months. The giving of this notice within the time limit of thirty days, and the making claim for compensation with-

in six months, of the date of the accident, are conditions precedent to any right of the employee to recover compensation.

As to notice, ordinarily there is no formal requirement of written notice; knowledge on the part of the employer that the employee has suffered an accidental injury will be sufficient to dispense with special notice oral or written. Where an agent of the employer, as, for example, the foreman or superintendent, was present and witnessed the accident, this will be sufficient to comply with the notice requirement, for notice to the agent is notice to the principal. Where the injured employee seeks medical aid from the company doctor and tells him the circumstances of his injury, here also the employer will be deemed to have knowledge, irrespective of whether the doctor reported the accident to the employer.

The purpose of the notice requirement is to prevent liability attaching for fraudulent claims without the opportunity given the employer to investigate them before such lapse of time that the fraud could not be discovered.

Claim for compensation must be made within six months of the accident. Usually there are no formal requirements for such claim; it may be verbal or written. It may be a request for compensation for disability, or for medical or hospital treatment, if the employer understands that the request is made on account of accidental injuries. Filing suit within the six months will be sufficient to constitute claim.

PITTMAN v. GLENCLIFF DAIRY PRODUCTS CO.

Supreme Court of Kansas, 1941.
154 Kan. 516, 119 P.2d 470, 144 A.L.R. 600.

Hoch, J. This case arises under the Workmen's Compensation Act. Gen.St.1935, 44-501 et seq. Respondents, the employer and its insurance carrier, appeal from a compensation award made to an injured employee. The issue presented is whether written notice of claim was served in time. The answer will be found to turn on the question of whether "compensation" was paid by the employer within certain periods following the injury.

Harry Pittman, the appellee, was employed as a cream tester by the Glencliff Dairy Products Company at Independence, Kansas, at a salary of \$80 a month. On or about November 15, 1936, while engaged in his regular employment, sulphuric acid was accidentally spilled upon his hands, causing painful injury. Under circumstances unnecessary to relate in detail, the injury grew worse in the course of several succeeding years. The first written demand for compensation was made on August 13, 1940, about three years and nine months after the injury.

The claim was heard by the district court of Montgomery county in April, 1941, on appeal from an award made in favor of the claimant by the Workmen's Compensation Commissioner. On May 17, 1941, the trial court affirmed the award and entered judgment against the employer and its insurance carrier in the sum of \$11.07 per week for 226 weeks from July 22, 1940, and also in the sum of \$226.93 for medical, surgical and hospital treatment, and for costs.

It is admitted that both the claimant and the company were subject to the workmen's compensation law and there is no contention that he did not suffer a compensable injury. The sole contention is that the claim was barred under the provisions of G.S. 1935, 44-520a (the accident having occurred prior to G.S. 1939 Supp., 44-520a) the pertinent part of which reads as follows:

"No proceedings for compensation shall be maintainable hereunder unless a written claim for compensation shall be served upon the employer * * * within ninety (90) days after the accident, or in cases where compensation payments have been suspended *within ninety (90) days after the date of the last payment of compensation* * * *." (Italics supplied.)

It is well established that unless written claim for compensation is served upon the employer within the ninety days specified, a claim for compensation cannot be entertained. Long v. Watts, 129 Kan. 489, 283 P. 654; Graham v. Pomeroy & Graham, 143 Kan. 974, 57 P.2d 19; Smith v. Sonken-Galamba Corp., 149 Kan. 693, 88 P.2d 1114. It has also been held that if the claim is once barred under the statute it cannot be revived, even by subsequent voluntary payments by the employer. The ninety day provision (now 120 days) is imperative and it cannot be waived. Graham v. Pomeroy & Graham, 143 Kan. 974, 975, 57

P.2d 19. Further, it has been held that payment for medical attention is tantamount to payment of compensation. Richardson v. National Refining Co., 136 Kan. 724, 18 P.2d 131; Ketchell v. Wilson & Co., 138 Kan. 97, 23 P.2d 488. The question then is whether there was any period in excess of ninety days in which no compensation was paid, between November 15, 1936, when the accident occurred, and August 13, 1940, when the written notice of claim for compensation was first served. More accurately, whether there was any substantial evidence to support the finding, in effect, of the trial court that "compensation" was paid without the intervention of any such ninety day period.

* * *

The trial court's finding of fact number X was as follows:

"Respondent paid claimant the sum of \$11.07, as compensation, weekly, from November 22, 1936, to June 2, 1940, for 182 weeks in the total sum of \$2014.74. That said weekly payments although not 'earmarked' compensation were, in fact, compensation. That the balance in excess of said sum of \$2014.74 paid by respondent to claimant was for services and a gratuity on account of sympathy for his situation and condition."

This finding was based on other findings to the effect that the work to which appellee was assigned after the accident was lighter work, and that respondent continued to pay him the same wages even though he could not do the lighter work well.

First, what evidence, direct or circumstantial, was there to support these findings? Following the accident appellee was transferred from his job as milk tester and given a job delivering milk on a milk route. He testified that the new work on the milk route was lighter than that of a cream tester in that "the heaviest lifting would be around 40 pounds" whereas as a tester he had "handled from 5 to 100 pounds of cream." Also, on the truck route he did not have to put his hands in milky water or have milk on them, since all the milk handled on the route was in bottles or sealed up. The only evidence that the new work was "lighter" was appellee's own statement to that effect. There was no testimony that the services he furnished were not worth \$80 a month. * * *

As to the trial court's finding (number X) that out of appellee's weekly salary of \$18.46 the sum of \$11.07 constituted "com-

pensation" although not so "earmarked," we find no factual basis in the evidence for such computation. There was no evidence that the service performed was not worth \$18.46 a week nor that \$11.07 represented any difference between what the employee earned and what he was paid. The sum of \$11.07, as a finding of fact, is wholly unsupported.

The issue finally arrived at is a narrow one. In order to affirm the instant judgment we would have to say that in any workmen's compensation case a part of the wages paid an employee, following an injury, may be designated "compensation" upon a record limited substantially as follows: the employee, having suffered some injury, was retained by his employer at a normal or regular wage, in the same or other work; testimony by the employee alone that he was given "lighter" work and was not in fact able to do satisfactorily the work for which he was paid; no evidence that the services which he rendered were not worth the amount which he received. To hold such evidence sufficient to impute to employers the voluntary payment of "compensation" would enunciate a rule not only uncalled for by the Act but, in our opinion, one which would inevitably work to the injury of employees. Certainly few employers would take a chance upon retaining an employee or showing him any consideration on account of an injury, knowing they may be faced at some time in the future with the contention that even though they did not know it, and had no reason to know it, they have in fact been paying "compensation" in addition to wages, and may be liable not only for future payments of compensation, but for past deficiencies in large and uncertain amounts. Such a rule, in its practical results to employees, would be contrary to the liberal interpretation enjoined by the Act and to which we have steadfastly adhered. In order to extend, by payment of compensation, the time within which written notice of claim must be served, as provided in the statute, the facts must be such that it can reasonably be said, based upon substantial evidence, that the employer was aware, or should have been aware, that he was making such compensation payments. * * *

Appellee's condition makes a strong appeal to the sympathies. He was entitled to relief under the law. This court frankly shares in regret that by his own inaction he failed to bring himself within its benefits. But an unwarranted, unsound and harm-

ful interpretation of the law cannot be made in order to help an individual no matter how worthy he may be.

We find from the record that following the injury a period many months in excess of ninety days transpired, and before any written notice of claim for compensation was served, within which the respondents neither paid for any medical aid for appellee nor made any other payments of compensation. It follows, therefore, that appellee's claim was barred under the law as above stated.

The judgment is reversed with directions to enter judgment for the respondents.

IDEAL FUEL CO. v. INDUSTRIAL COMMISSION et al.

Supreme Court of Illinois, 1921. 298 Ill. 463, 131 N.E. 649.

FARMER, J. * * * Section 24 of the Workmen's Compensation Act [Hurd's Rev.St.1919, c. 48, § 149] provides that claim for compensation shall be made within six months after the accident, or, if payments have been made under the act, * * * within six months after such payments have ceased. * * * The statute is mandatory and must be complied with to give the Industrial Commission jurisdiction. * * *

Defendant in error contends a claim * * * for compensation was made within six months. Defendant in error never returned to his employment and no payments were ever made to him. * * * The principal reliance [as to claim made] is a purported * * * letter written by the wife of defendant in error to E. W. Baker, general manager of plaintiff in error. * * * The letter of Mrs. Fox in substance referred to the many years her husband had been employed by plaintiff in error and the "misfortune coming to him in such an unexpected way," and the writer said she was obliged to appeal to the company for some consideration; that her husband had served the company to the best of his ability "until he fell on the job"; that he was in a hospital and any assistance would be appreciated. The letter concluded with the sentence, "Hoping that you will sympathetically and charitably consider my appeal." * * * That letter is the basis for the claim that demand was made. It was well calculated to appeal to the kindness and generosity of

the employer to do something for an old, faithful employee in his unfortunate and distressing condition, but contains no intimation that he claimed any legal right to demand compensation. No special form for claim of compensation is required and the claim need not be in writing, but it must apprise the employer that the employee is entitled to compensation and that demand therefor will be made. It here plainly appears from the evidence that no demand for compensation was made within the time required.

The order of the circuit court affirming the award of the Industrial Commission will be reversed.

Reversed.

CHAPTER 2

AMOUNT OF COMPENSATION PAYABLE

Section

1. In General.
 2. Compensation for Death.
 3. Compensation for Injuries not Resulting in Death.
-

SECTION 1.—IN GENERAL

The amount of compensation recoverable for every specific injury is definitely fixed in the statute, so that the employer may insure against all possible liability at minimum cost, and the employee may with certainty rely upon receiving the compensation to which he is entitled.

Modern workmen's compensation legislation is the result of compromise between the conflicting interests of employer and employee. As stated in an expressive opinion:

"Both had suffered under the old [common-law] system, the employers by heavy judgments of which half was opposing lawyer's booty, the workmen through the old defenses or exhaustion in wasteful litigation. Both wanted peace. The master in exchange for limited liability was willing to pay on some claims in future where in the past there had been no liability at all. The servant was willing not only to give up trial by jury but to accept far less than he had often won in court, provided he was sure to get the small sum without having to fight for it. * * * To win only after litigation, to collect only after the employment of lawyers, to receive the sum only after months or years of delay, was to the comparatively indigent claimant little better than nothing. The workmen wanted a system entirely new."¹

¹ *Stertz v. Industrial Ins. Commission*, 91 Wash. 588, 158 P. 256, Ann. Cas. 1918B, 354 (1916).

Under the workmen's compensation law, the employee gains an absolute right to compensation for injury, without regard to fault or negligence on the part of the employer. In effect, the employer becomes an insurer of his employees so far as injuries received in connection with the employment are concerned. On the other hand, the workman under the Compensation Act gives up his right to recover the full amount of his loss, and agrees to accept the limited amount of money prescribed by the act, often far less than he might have recovered at law. For example, for an injury resulting in death or permanent total disability, at law the workman, provided he can prove the injury due to the employer's negligence, may obtain by the jury's verdict a judgment of perhaps ten or twenty or thirty thousand dollars damages against the employer; while under the compensation law the maximum amount obtainable is in the neighborhood of five thousand dollars.

The general scheme of all workmen's compensation legislation fixes as a base the amount of compensation payable for injury not resulting in death at one-half the average earnings of the injured workman, and for injury resulting in death or total disability four times the average annual earnings, providing a maximum and minimum amount within which the sum payable must lie. In general it may be said that the maximum is usually fixed at about \$5,000, and the minimum at \$1,500. It is impracticable to attempt to compare the provisions of the various acts on this subject. The statute of the state in which the injury occurred should be consulted in any specific case. However, the general scheme of Workmen's Compensation Acts is similar, and an understanding of the subject may be attained by examination of a typical statute. The Illinois act is directly modeled on the English workmen's compensation statute, and is typical of its class. What is said in this chapter concerning the amount of compensation payable is said with the above considerations in mind, and with particular reference to the Illinois act.

In making provisions for the amount of compensation that shall be paid for injuries, the statutes make two great classifications: (1) Injuries resulting in death; and (2) injuries not resulting in death. We shall consider these separately.

SECTION 2.—COMPENSATION FOR DEATH

The amount of compensation payable for an accidental injury to an employee arising out of and in the course of the employment resulting in death is in general four times the average annual earnings of the employee, but in no case less than sixteen hundred and fifty dollars, nor more than thirty-seven hundred and fifty dollars.

If the deceased employee left a widow or children, whom he was under a legal obligation to support at the time of his death, then the compensation is payable to them. In the case of a widow and one child under the age of sixteen, the maximum is increased to four thousand one hundred dollars, and the minimum to two thousand dollars. In the case of a widow and two children, the maximum is increased to four thousand three hundred and fifty dollars, and the minimum to two thousand one hundred dollars.

If there were no widow nor children whom the deceased employee was under legal obligation to support, then if the employee left any parent, husband, child or children who were totally dependent upon his earnings, compensation amounting to four times the annual earnings of the employee, but in no case less than sixteen hundred and fifty dollars, nor more than thirty-seven hundred and fifty dollars, is payable to them.

In the event that there was less than total dependency, then there is payable such proportion of four times the average earnings as the partial dependency bears to total dependency.

If no amounts are payable as above, then, the compensation is payable to collateral heirs, if any, in amounts proportional to their dependency.

If the injured employee died without any relatives whatever in any way dependent upon him, then the employer will be liable only for funeral expenses to the amount of one hundred and fifty dollars.²

² Compensation Act Ill.1925 (Laws 1925, p. 380), § 7, Smith-Hurd Stats. c. 48, § 144.

ROCK ISLAND BRIDGE & IRON WORKS v. INDUSTRIAL COMMISSION et al.

Supreme Court of Illinois, 1919. 287 Ill. 648, 122 N.E. 830.

DUNN, J. * * * The commission found that the deceased's wages were \$1,400 a year; that his mother, Mary McQuaid, was his sole beneficiary and was partially dependent upon him to the extent of fifty-six per cent. of total dependency, and was entitled to receive fifty-six per cent. of four times his annual wages, being \$3,136, and made an award of that amount. * * *

The evidence tended to show that the mother's only means of support was \$90 a month, which she received from her husband and her son. While her husband was under a legal duty to support her, the question whether she actually received all or a part of her support from her son and looked to him for such support is a question of fact, which upon this record is concluded by the finding of the commission that she was partially dependent upon him. There is, however, no evidence which tends to sustain the finding that her dependency was fifty-six per cent. of total dependency. The evidence is that she received \$90 a month, all of which was expended in paying the expenses of the family of six persons. The dependency which justifies an award is a personal pendency for support and maintenance—an actual dependency for support consistent with the dependent's position in life. It does not include the maintenance of others whom the dependent is under no legal obligation to maintain or contributions which merely enable the donee to accumulate money.
* * *

The \$40 from the husband's income was at least a partial support. The additional \$50 was a general benefit to the family, but there is no basis in the evidence for determining what proportion of it was used for the support of the mother and what proportion for general family expenses. There is therefore no basis for the finding that her dependency was fifty-six per cent. of total dependency. The finding of partial dependency, whatever its degree, entitled the claimant to the minimum award of \$1,650.

The facts found were sufficient to constitute the basis for a proper decision, and the judgment of the circuit court is therefore reversed and the cause is remanded, with directions to enter

an award for \$1,650, payable in installments, if the claimant shall elect to accept such award, otherwise to remand the cause to the Industrial Commission for another hearing.

Reversed and remanded with directions.

SECTION 3.—COMPENSATION FOR INJURIES NOT RESULTING IN DEATH

The amount of compensation payable for injuries not resulting in death is one-half the average weekly wage for the period of disability. In addition, the employer must pay all medical, surgical, and hospital bills.

As above stated, the amount of compensation payable by the employer for injuries not resulting in death is one-half the average earnings; that is, an employee working for twenty dollars per week, who suffers an accidental injury arising out of and in the course of his employment, would be entitled to ten dollars per week from his employer during the period of his disability. If he have minor children to support, the portion of the weekly wage is slightly increased. It is, however, of importance to note that a maximum is set by the act beyond which the workman may not recover, no matter how large his weekly wage should be. This maximum is set usually in the Compensation Acts at \$18; and an employee whose wage is \$50 per week would be entitled only to the maximum, or \$18 per week. Thus it will be seen that compensation legislation is designed primarily for the workman, and not for the highly paid mechanic or salaried superintendent.

Medical Bills and Temporary Disability.—Compensation Acts ordinarily place upon the employer the duty of payment of medical, surgical, and hospital bills incurred by the employee in the treatment of his injury, as well as payment to the employee of compensation at the rate of half the weekly wage during the period of his disability even where the disability is not permanent but only temporary. However, there is no liability upon the

employer to pay compensation where the temporary disability is for a less period than what is called the "waiting period," usually eight days; nor where the temporary disability is less than total.

Permanent Partial Disability.—For any injury which partially incapacitates the workman from pursuing his usual line of employment, compensation is payable in amount equal to one-half the difference between the average amount he earned before the accident and the average amount he is able to earn after the accident. The compensation payable for permanent partial disability is thus fixed at half the loss of earning power.

Specific Loss.—All of the Compensation Acts carry a fixed schedule whereby the exact amount of compensation payable for amputation or permanent loss of use of the various members of the body is provided. This schedule fixes an evaluation of one-half the weekly wage for a period of weeks varying from sixteen weeks for the loss of the little finger to two hundred and twenty weeks for the loss of the arm. Fingers, arms, legs, feet, eyes, etc., are all separately provided for in varying numbers of weeks at half pay.

Total Permanent Disability.—In the event of complete disability, which renders the employee wholly and permanently incapable of work, compensation equal to one-half of his earnings is payable weekly until the amount so paid equals the amount payable as a death benefit; and thereafter a pension for life is payable equal to eight per cent. of the amount of the death benefit.

Disfigurement.—Where there is no permanent disability, partial or total, the employer who has paid compensation for the period of temporary total disability, and has paid the medical and hospital bills, is not subject to any further liability, except when the employee has suffered a disfigurement as a result of the accident. For pain and suffering there is no liability, but for disfigurement the workman may recover compensation up to a reasonable amount, not ordinarily in excess of five hundred dollars.

**CHICAGO HOME FOR THE FRIENDLESS v. INDUSTRIAL
COMMISSION et al.**

Supreme Court of Illinois, 1921. 297 Ill. 286, 130 N.E. 756.

THOMPSON, J. * * * January 28, 1917, while in the employ of plaintiff in error as a laundress, Kate Budnick caught her left hand in a mangle and mashed it badly, necessitating the amputation of her fingers. She developed a state of tetanus, which involved the muscles of mastication. * * * She masticates her food with difficulty and there is a noticeable disfigurement of her face. Medical, surgical, and hospital treatment were furnished to her by plaintiff in error. Her weekly wage was \$12 and she was paid full compensation throughout the period of temporary disability. The commission awarded her \$6 a week for a period of 150 weeks as compensation for the loss of the left hand and \$6 a week for a period of 104 weeks as compensation for a serious and permanent disfigurement of the face.

Plaintiff in error concedes its liability for the loss of the left hand and has voluntarily paid the installments arising out of that injury as they fell due. It contends, however, that it is not liable under the Compensation Act for any disfigurement of the face of defendant in error. We have held that if an employee receives two injuries—one that disables him and another that causes disfigurement of his hands, face or head—he is entitled to compensation for the disability, and the disfigurement. *Wells Bros. Co. v. Industrial Com.*, 285 Ill. 647, 121 N.E. 256; *International Coal & Mining Co. v. Industrial Com.*, 293 Ill. 524, 127 N.E. 703, 10 A.L.R. 1010. On the other hand, we have held that where an employee is disabled and disfigured by the same injury he is not entitled to recover compensation for the disfigurement. *Smith-Lohr Coal Co. v. Industrial Com.*, 291 Ill. 355, 126 N.E. 164. The only question presented for decision is, therefore, whether defendant in error suffered one or two injuries. If at the time her hand was crushed in the mangle she had fallen into the machinery and disfigured her face, there would be no question but that she would be entitled to compensation for the injury to the hand and the disfigurement to the face, but the facts here present a different situation. Defendant in error suffered a single injury, which has resulted in a disability and a disfigure-

ment. Paragraph (c) of section 8 of the Compensation Act of 1915—the one under which this proceeding is had—provides: "For any serious and permanent disfigurement to the hand, head or face, the employee shall be entitled to compensation for such disfigurement: * * * Provided, that no compensation shall be payable under this paragraph where compensation is payable under paragraphs (d), (e), or (f) of this section: And, provided, further, that when the disfigurement is to the hand, head or face as a result of an injury, for which injury compensation is not payable under paragraphs (d), (e) or (f) of this section, compensation for such disfigurement may be had under this paragraph." Laws of 1915, p. 403, Smith-Hurd Stats. c. 48, § 145 (c). Compensation was payable and has been awarded under paragraph (e) of section 8 for loss of the left hand—the only injury defendant in error received. Compensation has been paid for the temporary disability resulting from the sickness which followed this injury, and the act does not authorize further compensation for a disfigurement resulting from the same sickness. This case presents a meritorious claim for which compensation is not provided by the terms of the act, but the courts are not authorized to write a provision into the act in order to sustain this award. The remedy is with the Legislature. * * *

Reversed in part and affirmed in part.

CHAPTER 3

LIABILITY OF OWNER, CONTRACTOR, AND SUBCONTRACTOR TO PAY COMPENSATION

1. LIABILITY OF THE SUBCONTRACTOR

The liability of the subcontractor to pay compensation to his employees injured in the course of their employment is of course direct, and by virtue of the provisions of the compensation act. As to his employees, the subcontractor stands in the relation of employer; and the provisions of the act impose liability upon him without any alternative. Since practically all compensation acts expressly declare as hazardous all construction, excavation, electrical work, and the erection, maintenance, removal, remodeling, altering, or demolishing of any structure, almost every conceivable detail of the building trades is brought under the compensation law automatically and without election, and it is safe to assume that any principal contractor or subcontractor in any state which has a compensation statute is subject to the act.

2. LIABILITY OF CONTRACTOR AND OWNER

As to his own employees, the contractor or the owner will be liable to pay compensation for injuries received in the employment, according to the terms of the act. There is no direct liability on the owner or contractor to pay compensation to employees of the subcontractor, but many of the compensation statutes contain clauses which impose liability upon the owner and contractor, where the subcontractor has failed to insure his liability in some insurance company authorized under the laws of the state in which he is operating. Such provision, where the condition of insurance has not been complied with by the subcontractor, places a duty on the principal contractor to pay compensation to the workmen in the employ of the subcontractor as well as to his own employees. And as to the owner, where neither principal contractor nor subcontractor is insured, he may be forced to pay compensation to the subcontractor's employees, the contractor's employees, and to the men who work directly for him.

BUTLER ST. FOUNDRY & IRON CO. v. INDUSTRIAL BOARD OF ILLINOIS et al.

Supreme Court of Illinois, 1917. 277 Ill. 70, 115 N.E. 122.

COOKE, J. This is a writ of error to review a judgment, entered by the circuit court of Cook county, confirming and approving a decision of the Industrial Board awarding compensation to the widow and administratrix of Frank Willman, Jr., deceased, against the Butler Street Foundry & Iron Company, plaintiff in error.

John Martin was a subcontractor under plaintiff in error in the erection of structural iron work on a building in the city of Chicago. The deceased was in the employ of Martin, and on October 14, 1915, sustained an injury in the course of his employment which resulted in his death. At the time of the injury to the deceased Martin had not insured his liability under the Workmen's Compensation Act, Smith-Hurd Stats. c. 48, § 138 et seq. The widow, who is also administratrix of the estate of the deceased, filed a petition with the Industrial Board to be awarded compensation against Martin and the plaintiff in error. The board of arbitration awarded her \$3,500, payable in weekly installments of \$11.54, \$50 expended in first aid treatment, and \$183.33 for medical, surgical, and hospital services, to be recovered against Martin and plaintiff in error. On petition for a review the Industrial Board approved the award. This decision was, in turn, approved by the circuit court of Cook county upon a writ of certiorari.

It was disclosed from the proof made that on different occasions plaintiff in error had directed Martin to take out insurance for the protection of his employes, and Martin had represented to it that such insurance would be carried. On October 13, 1915, the day before the deceased was injured, Martin secured \$200 from plaintiff in error, which he represented was for the purpose of providing for such insurance. This money was used by Martin for the purpose of paying off his men, and no part of the sum was used to take out insurance. Plaintiff in error contends that in insisting and demanding that Martin insure his liability to pay compensation under the Workmen's Compensation Act, and in advancing money to him for that purpose, it had required of him that he insure his liability to pay compensation, as was its duty

under section 31 of the Workmen's Compensation Act. Said section 31 is, in part, as follows:

"Any person, firm or corporation, who undertakes to do or contracts with others to do, or have done for him, them or it, any work enumerated as extrahazardous in paragraph (b) section 3, requiring employment of employés in, on or about the premises where he, they or it as principal or principals, contract to do such work or any part thereof, and does not require of the person, firm or corporation undertaking to do such work for said principal or principals, that such person, firm or corporation undertaking to do such work shall insure his, their or its liability to pay the compensation provided in this act to his, their or its employés, * * * shall be included in the term 'employer' and with the immediate employer shall be jointly and severally liable to pay the compensation herein provided for and be subject to all the provisions of this act."

It is the contention of the plaintiff in error that the word "require," as used in this section, is synonymous with the word "demand," and that plaintiff in error did all the act required of it when it demanded and insisted repeatedly that Martin take out insurance, and when it advanced him the money with which to pay for the insurance. While it is undisputed that Martin represented to plaintiff in error, when he secured the \$200 on October 13th, that he desired it for this purpose, it appears that the money was due him under his contract, and was not advanced as the money of the plaintiff in error. The word "require," as used in this section, is not used in the sense contended for by plaintiff in error. By this section it becomes the duty of the principal contractor to see to it that his subcontractor insures his liability to pay the compensation provided by the act or become liable himself to pay such compensation. Under the statute the principal contractor is made primarily liable for all injuries received by the employés of his subcontractor, and he can only escape this liability by requiring his subcontractor to insure his liability as provided by section 31. Knowing that he is thus liable unless he takes this precaution, the principal contractor must either see to it that the subcontractor insures his liability or stand ready to pay any compensation that may be awarded on account of an injury to an employé of the subcontractor. By making it a part of his contract with the subcontractor, the principal contractor

can require him to take out this insurance as easily and effectively as he can require him to perform any other provision of the contract between them. The statute contemplates an absolute requirement on the part of the principal contractor, and it is not complied with by a mere demand. The principal contractor can escape liability only in case his subcontractor insures his liability as is provided by this section.

It is further contended that under the provisions of paragraph (a) of section 8 of the act the limit of the liability of an employer for necessary first aid, medical, surgical, and hospital services is \$200, and that the circuit court erred in confirming the award of the Industrial Board for an amount in excess of \$200 for such services. Paragraph (a) of section 8 of the act is as follows:

"The employer shall provide necessary first aid, medical, surgical and hospital services; also medical, surgical and hospital services for a period not longer than eight weeks, not to exceed, however, the amount of \$200. The employé may elect to secure his own physician, surgeon or hospital services at his own expense."

We are of the opinion that under a proper construction of this paragraph of section 8 the contention of the plaintiff in error is correct, and that the total amount which can be awarded for first aid, medical, surgical, and hospital services is the sum of \$200. The award of \$233.33 for such services was in excess of the limitation prescribed in the statute, and should have been approved and confirmed only in the sum of \$200.

The judgment of the circuit court is reversed, and the cause is remanded for such further proceedings as are consistent with the views herein expressed. The costs in this court will be assessed one-third to defendant in error and two-thirds to plaintiff in error.

Reversed and remanded.

DAVIS v. INDUSTRIAL COMMISSION et al.

Supreme Court of Illinois, 1921. 297 Ill. 29, 130 N.E. 333, 15 A.L.R. 732.

[Davis was engaged in the hardware business. He also owned an apartment house, in which he rented out apartments for in-

come. Davis contracted with Greenough for Greenough to clean the outside walls of the apartment house. Employees of Greenough, while cleaning the walls, fell from a scaffold. Greenough was insolvent and had not insured against liability under the act. The employees obtained an award for compensation against Davis, which the circuit court affirmed. Error.

[Section 28 of the act, Smith-Hurd stats. c. 48, § 165, provides that, if an employer carries liability insurance, the insurer as well as the employer shall be liable to an employee. Section 31 provides that (with the exception of work done on a farm, or country place, etc.) a person engaging in a business or enterprise of erecting, maintaining, removing, altering or demolishing any structure, or of construction, excavating or electrical work (every such business being declared to be extrahazardous) who has the work done by a contractor or subcontractor, shall be liable to make compensation for injury to the employees of the contractor or subcontractor unless the contractor or subcontractor has insured against liability.]

FARMER, J. * * * It is also contended by plaintiff in error that he is not liable under section 31 of the Workmen's Compensation Act, Smith-Hurd Stats. c. 48, § 168. His argument is he was engaged in the business of a hardware and paint merchant, and while he owned the building in question and some others which he maintained and rented for income, he was not engaged in the business of maintaining the building and the business in which he was engaged was not embraced in the Workmen's Compensation Act. * * * We do not understand that it is required by the Workmen's Compensation Act that one shall be exclusively engaged in one of the hazardous occupations enumerated to make him liable to compensation. This court has held that a man may engage in two kinds of business, one not extrahazardous or within the Workmen's Compensation Act unless the party so elects, and the other may be within the act without election because it is extrahazardous. *Vaughan's Seed Store v. Simonini*, 275 Ill. 477, 114 N.E. 163, Ann.Cas.1918B, 713. The work being done at the time the accident happened was done in maintaining the building. It was, in fact, dangerous and extrahazardous.

Judgment affirmed.

MECHANIC'S LIENS

Chapter

1. Nature of Lien.
 2. Persons Entitled to Lien.
 3. For What Lien may be Obtained.
 4. Proceedings to Obtain Lien.
 5. Rights and Duties of Owner, Contractor, and Subcontractor.
 6. Enforcement of Liens.
 7. Waiver of Lien.
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CHAPTER 1

NATURE OF LIEN

A lien is a form of security for the payment of a debt. It consists of a right in one man, the creditor, in the property of another, which is to continue as a burden on the property until the debt is paid.

Liens on personal property are of two kinds: One, the informal, possessory lien; and, two, the formal lien of a chattel mortgage. In the case of the possessory lien, the creditor's right in the debtor's property depends upon his continued possession. The common example is the pledge of goods. If A borrows a sum from B and turns over to B his watch or automobile to hold as security for the debt, the article is in pledge or pawn until payment. A railroad, having carried goods, has a lien upon the goods for the freight; which is to say that the railroad has the right to retain possession of the goods and refuse to give them up to the owner until the freight is paid. So, also, an innkeeper has a lien upon a guest's personal effects; a warehouseman has a lien upon goods pledged. Since such liens upon personality consist of a right of possession, if the creditor loses possession, he loses his lien.

The chattel mortgage is a formal lien upon personal property. It, like a mortgage of real property, consists of a right in the

chattel paramount to the debtor's ownership, and extinguishable only on payment of the debt. This right is apart from possession which continues in the debtor.

In liens upon real property, the right given the lienholder is not that of possession, but rather a right in the value of the land. The debtor landowner sells or retains his land subject to the lien. The land itself is charged with payment of the debt. A real estate mortgage is an example of this kind of lien.

Enforcement of Liens.—The enforcement of all liens, whether on real or personal property, is in the main the same, although the procedure is different. In each case the lien is enforced by compelling a public sale of the property, and the creditor lienholder's debt is paid to him out of the proceeds, any balance remaining being returned to the debtor property owner.

Mechanics' Liens.—Most of the liens referred to above were recognized by the common law. Mechanics' liens, on the other hand, are entirely a creature of statute, depending for existence, extent, enforcement, etc., upon the language of the legislative enactment. Most of the mechanics' lien statutes of the various states are similar in general outline, but differ in many cases as to detail. It is therefore necessary to consult the statute of any particular jurisdiction to determine whether the local lien law differs from the provisions contained in most of the mechanics' lien acts. For an understanding of the general theory and application of mechanics' liens, however, we may examine the provisions of a typical statute and the interpretation given it by the courts.

"Any person who shall by * * * contract, express or implied, * * * furnish material, fixtures, apparatus, machinery, or forms, for the purpose of building, altering, repairing, or ornamenting any * * * building, walk, driveway, fence, or improvement, * * * or fill, sod, or excavate such land, or do landscape work thereon; or raise or lower any house thereon; or perform services as architect or structural engineer; or furnish or perform labor or services as superintendent, timekeeper, mechanic, or laborer in the building, altering, or repairing of the same, shall have a lien upon the whole of such lot or tract of land * * * for the amount due to him for such material, fixtures, machinery, services or labor. * * *"

Definition of Mechanic's Lien.—A mechanic's lien is a right created by law to secure priority of payment of the price or value of work performed and materials furnished in the improvement of land, and this right attaches to the land and the buildings erected thereon. Under most of the lien statutes, any person who expends services or materials on another's land is entitled to a lien therein for the price. And this means that the land itself is chargeable with the payment; that it may be sold to satisfy the lienholder's claim.

CHAPTER 2

PERSONS ENTITLED TO LIEN

The mechanic's lien statutes name the classes of persons who may acquire liens. They are: Contractors, subcontractors, and sub-subcontractors.

A contractor is a person who furnishes services or material directly to the owner.

A subcontractor is a person who furnishes services or material to the person who contracts with the owner.

A sub-subcontractor is a person who furnishes services or material to one to whom the contractor has sublet a part or all of the construction.

Contractors.—Any person who furnishes services or material to the owner, or the owner's agent, directly, is termed a contractor. The construction company, which contracts with the owner of land to build a building thereon, is a contractor. The lumber dealer, who sells directly to the owner of land lumber to be used in the erection of a building, is a contractor.

Subcontractors.—The subcontractor is the person who furnishes services or material to the person who contracts with the owner. The lumber dealer, who sells material for a building to the construction company which has contracted with the owner of the land to build the building, is a subcontractor. The plumber, who has contracted with the construction company to install the plumbing in the building, is a subcontractor. The subcontractor is one to whom a portion or all of the contract is sublet.

Sub-subcontractors.—The sub-subcontractor is the person who furnishes services or materials for a building to the person to whom the contractor has sublet a portion or all of the contract. For example, suppose an owner employs A to erect his home for a certain price. A in such case is the contractor, within the meaning of the lien law. A employs B, a cement contractor, to put in the foundation for a certain price. B is then the subcontractor.

B contracts with C to furnish the cement. C is the sub-subcontractor.

Materialmen.—A materialman is one who furnishes material for a building by contract with the owner, contractor, or subcontractor. He is himself a contractor, subcontractor, or sub-subcontractor, within the meaning of the lien law, according to whether he dealt with the owner, contractor, or subcontractor. In any case, he is entitled to a lien for all material delivered for incorporation into the building.

Mechanics and Laborers.—The statutes of the various states generally provide for liens for work done on improvements by mechanics and laborers. The mechanic or laborer is usually either a subcontractor or a sub-subcontractor according to whether he was employed by the contractor or the subcontractor.

Architects, Structural Engineers, Superintendents.—As to architects and structural engineers, although many statutes specifically give them a lien, certain questions frequently arise as to their lien rights, particularly where the projected building was in fact never built. Where the statute in a particular jurisdiction does not mention architects, the problem arises as to whether they may claim a lien under the clause, "Any person who has performed labor," etc.

FRIEDLANDER v. TAINTOR.

Supreme Court of North Dakota, 1905.

14 N.D. 393, 104 N.W. 527, 116 Am.St.Rep. 697, 9 Ann.Cas. 96.

YOUNG, J. The plaintiff brought this action to foreclose a mechanic's lien upon a certain two-story store and office building situated in the city of Park River. The findings and judgment of the trial court were in plaintiff's favor. The defendant has appealed from the judgment, and assigns error upon the judgment roll paper.

The trial court found, among other things, that the plaintiff furnished plans and specifications for, and superintended the construction of, said building, pursuant to a contract with the defendant, under the terms of which the plaintiff was to be paid for his services 3 per cent. of the cost of the building. The ap-

peal presents but a single question. The plaintiff is an architect, and the lien involved in this case is for his services in drawing plans and specifications and supervising the construction of the building upon which the lien is claimed. The defendant contends that such service will not support a lien under our statute. This contention cannot be sustained. Section 4788, Rev. Codes 1899, declares that "any person who shall perform any labor upon * * * any building or other structure upon land * * * under a contract with the owner of such land * * * shall * * * have for his labor done * * * a lien upon such building." The statute does not designate the persons who are entitled to liens under it by name or occupation. Its language is general. "Any person" who otherwise comes within its provisions is entitled to a lien. It includes all persons who perform "any labor upon any * * * building."

It is urged that the services of an architect in drawing plans and specifications and supervising the construction cannot be said to be labor upon the building. This question is not a new one to the courts, and it has been held with great unanimity that where the architect not only draws the plans, but superintends the construction, he is entitled to a lien; and this under statutes which merely give a lien in general terms for work and labor furnished in the erection of a building. * * * The Alabama statute uses the same language, and the court, in *Hughes v. Torgerson*, supra [96 Ala. 346, 11 So. 209, 16 L.R.A. 600, 38 Am. St. Rep. 105], sustained the lien of a supervising architect. "Are such services by an architect 'work or labor upon * * * a building or improvement on land,' within the meaning of the statute? Code, § 3018. It is plain that a contractor for the construction of the building is within the protection of the statute. If he was also intrusted with the planning of the building, and with the sole supervision of its erection, we think it equally plain that his services in these particulars could be regarded as properly a part of his work 'upon the building,' and that compensation therefor might be included in the amount for the security of which he could acquire a lien under the statute. Under a New York statute a lien was authorized in favor of 'any person who shall perform any labor or furnish any materials in building, altering, or repairing any house,' etc., 'by virtue of any contract with the owner,' etc. 'This language,' it was said in *Stryker v. Cassidy*,

76 N.Y. 50, 32 Am.Rep. 262, 'is general and comprehensive, and its natural and plain import includes all persons who perform labor in the construction or reparation of a building, irrespective of the grade of their employment or the particular kind of service. The architect who superintends the construction of a building performs labor as truly as the carpenter who frames it, or the mason who lays the walls; and labor of a most important character.' " * * *

There is a sharp conflict in judicial opinion as to whether an architect who merely furnishes plans and specifications is entitled to a lien. Upon this we express no opinion. The plaintiff's contract in this case included the supervision of the construction, and under the rule of construction adopted by the great majority of the courts under the same or similar statutes to which we give our adherence he was entitled to the lien.

Judgment affirmed. All concur.

FOSTER & LIBBIE v. TIERNEY et al.

Supreme Court of Iowa, 1894. 91 Iowa 253, 59 N.W. 56, 51 Am.St.Rep. 343.

The following is appellants' statement, in argument, of the facts set out in the petition: "The plaintiffs were architects in the city of Des Moines. One J. F. Tierney, the owner of the realty described in the petition, employed them, at an agreed percentage of the cost of certain improvements, to plan, devise, and construct plans and specifications for the remodeling and rebuilding of the building then standing upon the realty. By virtue of this employment, they were necessarily compelled to go, and did go, upon the premises, and into the buildings and improvements then standing, and measured the walls thereof, and dug into the earth about the foundation, and examined the walls and foundation, and spent much time and labor in and upon the said buildings and improvements. Upon the said measurements and examinations they devised and constructed, upon the said premises and in their office, plans and specifications for the erection and completion of the improvements then situate upon the said realty, and the owner accepted such plans and specifications. The plaintiffs duly filed their statement for a mechanic's

lien in Polk county, where the land is situated. The defendants purchased the property of J. F. Tierney with full knowledge of the existence of the claim of plaintiffs, and that they had not been paid for their labor. The plaintiffs brought suit in due time to foreclose their lien, and the defendants demurred to the petition, which was sustained. The plaintiffs appeal." Affirmed.

GRANGER, C. J. A ground of the demurrer is that it appears that the contemplated improvements were not made, nor were the plans and specifications used; and the legal proposition is presented whether or not, under such circumstances, a mechanic's lien would attach. By section 3, c. 100, Acts 16th Gen. Assem., it is provided: "Every mechanic or other person who shall do any labor upon * * * any building, erection or other improvement upon land * * * shall have for his labor done or materials, machinery or fixtures furnished, a lien upon such building, erection or improvement, and upon the land belonging to such owner on which the same is situated." It is important to observe for what a lien is granted. It is for labor upon a building, erection, or improvement upon land. It is not granted merely for labor upon land. It is not contended that anything more was done, in this case, than the preparation of the plans and specifications, which involved some labor in and about the building and premises. The work done was only to get information necessary to prepare plans for contemplated improvements or changes. We have no hesitancy in saying that the measurements and work done about the building give to the plaintiffs no greater right to a lien than would the preparation of the plans and specifications without such work and measurements, if designed for the same premises. It is then a question whether or not an architect who prepares plans and specifications for a building that is not erected, or an improvement that is not made, has a lien therefor.

Take the case of a building for which such plans are made, and it is not erected, and there is nothing to which the lien can attach but the naked land. Can it be said that work has been done upon the building? The law contemplates that the lien is to attach to the building and the land upon which it is situated. Reading the entire law of the state on the subject of mechanics' liens, and it is nowhere found expressed, nor does it seem to leave to legitimate inference, a right to such a lien for work,

unless it has been done upon, or in aid of, a building or improvement that such work has aided in producing. We are cited by appellants to a number of authorities in support of their claim, but all of them seem to be in harmony with our view; that is, in all the cases cited, where a lien is held to attach, there is something done in the way of a building or improvement to give rise to the lien. In Indiana, where the lien attaches to the building, it is held that the foundation of a barn constituted a building, within the meaning of the statute. *Scott v. Goldinghorst*, 123 Ind. 268, 24 N.E. 333. See, also, *Charnley v. Honig*, 74 Wis. 163, 42 N.W. 220; *Kelly v. Rowane*, 33 Mo.App. 440. In the case of *Knight v. Norris*, 13 Minn. 473, Gil. 438, the building was nearly completed, and then abandoned, and the claim of the architect for plans and specifications and superintending the work of construction was adjudged a lien on the premises. We are without any authority in support of the lien claimed in this case, and we do not think that it should be held to exist. The judgment of the district court is in harmony with this conclusion, and it is affirmed.¹

¹ In Illinois, a distinction is made between architects who draw plans for a building only, and those who superintend its erection, and the latter, who more positively perform work "in or about the building," are held to be entitled to a lien.

In Louisiana and Minnesota, the

architect is held to be entitled to a lien, even if he does not superintend, provided the building is actually built.

In Missouri, Kentucky, and Maine, an architect is not entitled to a lien, even if he superintends the building. This is the minority rule.

CHAPTER 3

FOR WHAT LIEN MAY BE OBTAINED

Section

1. Labor and Services Lienable.
 2. Materials Lienable.
 3. Public Improvements.
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SECTION 1.—LABOR AND SERVICES LIENABLE

The mechanic's lien statutes cover nearly every conceivable improvement which has become a part of and enhances the value of the premises. Every builder who constructs, repairs, alters, or decorates any building from a skyscraper to a woodshed, may obtain a lien on the property to secure the payment of the contract price. Every mechanic, laborer, superintendent, engineer, who contributes his services to the construction, may file a lien against the property to secure payment of his wages, salary, or fee. Every materialman who has furnished materials, fixtures, apparatus, or machinery for incorporation into a specified improvement may obtain a lien therein for the contract price.

Certain questions have arisen as to the lienability of the cost of labor and services performed upon articles which are designed to go into the construction of a building, but which were never so incorporated. As we have already seen, there is no lien for an architect's fee for plans and specifications contracted for a building which in fact was never built. A somewhat similar question arises as to other forms of labor and services, and as to materials delivered for incorporation into a particular improvement but actually not so included. These questions are considered in the cases following.

BERGER v. TURNBLAD et al.

Supreme Court of Minnesota, 1906.
98 Minn. 163, 107 N.W. 543, 116 Am.St.Rep. 353.

START, C. J. This is an appeal from a judgment of the district court of the county of Hennepin in favor of the plaintiff decreeing a lien to the extent of \$680.05 upon the premises of the defendant Turnblad, hereafter designated as the defendant. The only question presented by the record for our decision is whether the facts found by the trial court entitled the plaintiff to a mechanic's lien in any sum in excess of \$148.50. * * *

The balance of the work done by the plaintiff was at the shop of the contractor, where he was employed in making designs, models, and casts intended exclusively for and adapted to the construction of the ornamental plastering work in the house. This product of his work was of no value or use for any other purpose than that for which it was intended. It was necessary that such designs, models, and casts should be made preliminary and as the first steps in the work of constructing the ornamental plastering in the house pursuant to the contract. The defendant and the contractor for convenience adopted the shop as the place for doing such preliminary work, instead of the premises where the house was being erected, which was there supervised by the defendant's architect. Shortly after the plaintiff had completed such work at the shop the defendant and the contractor had a controversy as to their respective rights and duties under their contract. Thereupon the contractor, without any justifiable cause, refused to proceed with his contract, and although requested by the defendant so to do he refused to deliver such designs, models, and casts, or any of them, to the defendant, or to permit them to be used in the placing of the ornamental plastering in the house, and no part thereof was ever actually delivered upon the lots of the defendant, or in fact ever became a part of the house.

Do these facts justify the conclusions of law upon which the judgment is based, that the plaintiff performed labor and furnished skill for the erection of the house within the meaning of the statute? The statute then in force (Gen.St.1894, § 6229) reads as follows: "Whoever performs labor or furnishes skill * * * for the erection of * * * any house or other

building * * * by authority of the contract with, or at the instance of the owner thereof or * * * his contractor or subcontractor, shall have a lien to secure the contract price or value of the same upon such house and upon the right, title and interest of the owner thereof."

The defendant claims that through no fault of his but by reason of the wrong of the contractor he was deprived of all benefit of the plaintiff's labor except to the extent of \$250, and that other than this the plaintiff has not performed labor or furnished skill in the erection of the house, and having been paid \$101.50 thereon, he is entitled to a lien for only the balance \$148.50. It is clear that if the failure to place the product of the work of the plaintiff in the house had been that of the defendant and not of the contractor, the plaintiff would be entitled to a lien for the full value of his labor. If such were this case it would be ruled by the case of *Howes v. Reliance Wire Co.*, 46 Minn. 44, 48 N.W. 448. It was held in the case cited that, where material required by the contract for the construction of a building was prepared at the yard or shop of the contractor with the express or implied consent of the owner of the building, but was never actually placed in the building by reason of the fault of the owner thereof such work of preparation and manufacture must be deemed to have been furnished for the construction of the building, and that the contractor was entitled to a lien therefor. The converse of this proposition is necessarily true, and if the failure to place the materials in the building is due to the fault of the contractor he is not entitled to a lien.

In this case, however, while the product of the plaintiff's labor, although made expressly for the building, at the shop of the contractor with the defendant's consent and under his supervision by his architect, yet it never actually went into his house or upon his premises by reason of the wrongful act of his contractor. Can the wrong of the contractor in this case be imputed to the plaintiff? If the plaintiff's work had been done on the premises or the product thereof had been delivered thereon to be used in the erection of the house, and the contractor had wrongfully taken it away and diverted it to other purposes his wrong could not be imputed to the plaintiff and his right to a lien would be unaffected by the contractor's wrong. *Burns v. Sewell*, 48 Minn. 425, 51 N.W. 224. In the last case cited the

owner of a lot made a contract with a builder to erect a house thereon. The contractor purchased material to be used in the erection of the house from a third party who delivered it upon the lot, but the contractor removed it from the lot, and never placed it in the building so that the owner of the lot never received any benefit from the material. It was held that the materialman was entitled to a lien on the lot of the owner notwithstanding that by the wrong of the contractor in diverting the material the innocent owner of the lot never received any benefit from the material. The basis of this holding was succinctly stated by Mr. Chief Justice Gilfillan in these words: "Cases may, of course, occur where a dishonest contractor may divert to other purposes material sold and delivered for the purpose of constructing a building. But ordinarily, in such a case, the one who accredits the contractor and enables him to purchase on the credit of the building and land should suffer, rather than the innocent seller of the material."

The necessary inference from the two decisions we have cited is that mechanics and materialmen furnishing labor or materials for the erection of a building, at the request of the contractor, are given by the statute not simply the right to be subrogated to the rights of the contractor, but an independent right to a lien on the building and land upon which it stands, which cannot be defeated by the misconduct or fraud of the contractor. The owner when he enters into a contract with a builder for the erection of a house is deemed to contract with reference to the statute which becomes a part of the contract and in legal effect he thereby consents that his contractor may, subject to the conditions and limitations of the statute, pledge the credit of the building for the necessary labor and materials for its construction in accordance with the contract. *Laird v. Moonan*, 32 Minn. 358, 20 N.W. 354; *Bohn v. McCarthy*, 29 Minn. 23, 11 N.W. 127; *Bardwell v. Mann*, 46 Minn. 285, 48 N.W. 1120. It is true as a general rule that to entitle a mechanic or materialman to a lien for work performed or materials furnished at the request of the contractor, the work must be done, or the material delivered on the premises upon which the building is being erected.

The case of *Howes v. Reliance Wire Co.*, *supra*, however, establishes an exception to this rule which is to the effect that

where the material required for the erection of a building is specially prepared for it at the shop of the contractor with the consent of the owner, the material is deemed to have been furnished on the premises. The exception ought not to be extended to cases not fairly within the principle upon which it rests, otherwise the door will be opened for fraud or collusion between the contractor and the mechanic or materialman. The finding of the trial court in this case brings it clearly within the exception for the work of the plaintiff was, by the consent of the defendant, performed at the shop and it was there passed upon by the defendant, by his architect, as the work progressed. The defendant and the contractor adopted the shop as the place for doing the work which was necessary to be done in the erection of his house. The plaintiff's right to a lien then is exactly what it would have been if he had performed the labor in the preparation of the materials for the erection of the house on the premises upon which it was being built, and the contractor had refused to permit the product of his work to be placed in the house. It follows that the fact that the work was done at the shop and not on the premises does not affect the plaintiff's right to a lien.

This leaves only the question whether the wrongful act of the contractor is to be imputed to the plaintiff whereby his right to a lien will be defeated. Upon principal it logically follows, from what we have said as to the basis of a mechanic's or materialman's right to a lien, that his right cannot be impaired by any misconduct of the contractor to which he is not a party. Upon authority it necessarily follows from the decision of this court in the case of *Burns v. Sewell*, *supra*, that the right of an innocent mechanic or materialman to a lien cannot be impaired by the wrong or fraud of the contractor in which he in no manner participates. We therefore hold upon the particular facts of this case that the plaintiff was entitled to a lien for the full value of his work.

Judgment affirmed.

S. & D., ENG. & ARCH. 3RD ED.

SECTION 2.—MATERIALS LIENABLE

1. TEMPORARY MATERIALS

For such portions of temporary materials as are actually used up or destroyed in the process of construction of a building, a lien upon the property may be obtained.

The question as to whether there is a lien for materials used in construction, but not incorporated into the building, is one on which there is much conflict of authority. Some of the mechanic's lien statutes expressly create a lien for lumber used for forms or form-work for concrete construction; but even in such jurisdictions by judicial interpretation as indicated in one of the cases following, it would seem that delivery for the purpose of being used in the construction of the building is a necessary element. Where the material is used up or destroyed in the process of making or taking down the forms, it is difficult to see why there should not be a lien.

MORITZ v. LEWIS CONST. CO. et al.

Supreme Court of Wisconsin, 1914.
158 Wis. 49, 146 N.W. 1120, 51 L.R.A.,N.S., 1040.

This action was brought to foreclose a mechanic's lien. The respondent Sands Lumber Company furnished certain lumber to the contractor, who was engaged in building a reinforced concrete building on the land of appellants. The lumber was used for what is known in the trade as shoring; that is, wooden forms are constructed, into which the concrete is poured, and in which it remains until it has set, when the shoring is removed. The shoring is often used several times in constructing the same building. The case was sent to a referee, who made his report and findings, and his findings were substantially adopted by the court on the facts material here. The question involved is whether the Sands Lumber Company was entitled to a lien for the shoring furnished, or any part thereof. * * *

KERWIN, J. (after stating the facts as above). It is contended by appellant that the Sands Lumber Company acquired no lien for any of the lumber used in shoring, because it did not become a part of the structure, and, further, that the findings to the effect that 75 per cent. of the lumber was consumed in the construction of the building, and that 25 per cent. was depreciated in value, as specified in the findings are not supported by the evidence. A careful examination of the evidence convinces that the findings are well supported by the evidence. The question whether the Sands Lumber Company was entitled to a lien upon the established facts is a more delicate question. In a case recently decided by this court (*Barker & Stewart L. Co. v. Marathon P. M. Co.*, 146 Wis. 12, 130 N.W. 866, 36 L.R.A.,N.S., 875), it was held that where lumber was furnished and used in a cofferdam, which dam was no part of the building, but was afterwards torn or blown out and the lumber thereby became destroyed or practically so, the materialman furnishing the lumber was entitled to a lien upon the structure, though no part of the lumber became a part of it. It appeared that the cofferdam was a structure built in order to facilitate the construction of a concrete dam on the premises to furnish water power to operate the mill in process of construction on the premises. The cofferdam was a temporary affair, and became useless after construction of the permanent or concrete dam.

While the right to a mechanic's lien must be found in the statute, this court has held that the statute must be liberally construed, with a view of carrying out its intention and remedial purpose. The statute gives a lien for materials furnished "for or in or about" the erection of the structure, and the question here is whether the shoring used in the reinforced concrete building were furnished for, in, or about the building. There is no question here but what the material was furnished and delivered to be used in the building, and was in fact used for shoring, but did not remain in the building after the concrete had become set, and 25 per cent. of it was removed and used for other purposes, though considerably depreciated in value by use in appellant's building. Seventy-five per cent., as the court found, was practically consumed or destroyed by use.

This case is very similar in principle to *Barker & Stewart L. Co. v. Marathon P. M. Co.*, 146 Wis. 12, 130 N.W. 866, 36 L.R.

A.,N.S., 875. There the lumber did not remain in the structure, but was practically destroyed in the use. Here the lumber was actually used in the construction by supporting the concrete until it hardened and was self-supporting, and then was removed. It was thus used several times in the construction, and after the building was finished had become so damaged that 75 per cent. of it was practically destroyed and of no value, except for kindling wood, as the evidence shows and the court found.

It has been held that mechanics' liens may be allowed for the value of explosives used in preparing the ground for the building of the structure, upon the principle that where the material is used directly upon the structure instrumental in producing the final result and actually consumed in use, it may be said to form a part of the structure. See cases cited in Barker & Stewart L. Co. v. Marathon P. M. Co., 146 Wis. at page 22, 130 N.W. 866, 36 L.R.A.,N.S., 875. The logic of these decisions is, as said by this court in the Barker Case, that the material is consumed necessarily in the process of constructing the building, and that its life has gone into the fabric of the structure. This necessarily is peculiarly applicable to the instant case. The shoring had physical contact with the building in its construction. It added to the value of the completed structure, and its life and substance had in effect gone into the structure to the extent, at least, that the material was consumed. We think it clear, therefore, that the Sands Lumber Company, furnisher of the material, had a lien for the 75 per cent. of the lumber consumed.

Nor do we see any solid reason for denying a lien for the amount of depreciation of the remaining 25 per cent. of the lumber used for shoring. This lumber was likewise used in the construction of the building, but in such use was not wholly consumed, but was consumed or destroyed to the extent found by the court below, and for which amount of destruction or consumption a lien was awarded. Thus, the whole amount of consumption of the lumber used in the construction of the building was held lienable. This ruling is, we think, in harmony with Barker & Stewart L. Co. v. Marathon P. M. Co., *supra*, and late cases in other jurisdictions. * * *

In Avery & Sons et al. v. Woodruff & Cahill et al., *supra* [144 Ky. 227, 137 S.W. 1088, 36 L.R.A.,N.S., 866], it was held that

the materialmen had a lien for lumber furnished for shoring in construction of concrete building where the lumber was in greater part consumed in the building; and the case of United States F. & G. Co. v. Probst, 97 S.W. 405, 30 Ky.Law Rep. 63, is distinguished. Darlington L. Co. v. Westlake C. Co., 161 Mo.App. 723, 141 S.W. 931, holds that where the material is consumed in whole or in part the claim is lienable. This was a case of lien for shoring used in the construction of a concrete building.

True, there are cases holding that no lien exists for lumber used to make molds for concrete work; as, for example, Rittenhouse v. Brown, 254 Ill. 549, 98 N.E. 971. But it will be seen the lumber was not destroyed or consumed in that case, but was taken away and used again. In the case of Kennedy v. Commonwealth, 182 Mass. 480, 65 N.E. 828, the lumber was not consumed, but was moved away and used on other jobs. * * *

In the case at bar * * * the materialman was entitled to a lien for the value of such part of the lumber as was consumed. Horn v. Clark H. Co. et al., 54 Colo. 522, 131 P. 405, 45 L.R.A., N.S., 100. We are of opinion that the judgment of the court below is right, and should be affirmed.

The judgment is affirmed.

2. FIXTURES

A lien may be obtained only for materials delivered for the purpose of entering into the construction of the improvement itself. Anything permanently attached to the realty so as to become a part thereof, even though removable, is subject matter for a lien.

The materialman's lien may be obtained only for such articles as were delivered for the purpose of entering into the construction of the improvement itself. Furniture, for example, would not be lienable, for the reason that it could not have been intended to become an integral part of the realty; and this is the essential element. Thus, in considering the problem of what materials are lienable, it is necessary in each case to distinguish between chattels and fixtures. We must seek the legal interpretation as to a real estate "fixture," which is something substantially and permanently annexed to the soil (building), though in its nature

removable. The intention to make the article permanent governs in each case.

RIESER v. COMMEAU et al.

Supreme Court of New York, Appellate Division, Second Department, 1908.
129 App.Div. 490, 114 N.Y.S. 154.

JENKS, J. This is an appeal from a judgment of the Special Term in favor of the plaintiff in a suit to foreclose a mechanic's lien. The property proceeded against is known as "Public Library No. 12," in the borough of Richmond, city of New York. The New York Public Library, Astor, Lenox, and Tilden Foundation, executed a contract with the Vreeland Building Company for the building thereof. The Vreeland Company made a contract with Commeau to furnish certain material, and Commeau made a contract with the plaintiff for such work and material, save a certain specified part thereof. This action is against the public library as owner, the Vreeland Company as contractor, and Commeau as subcontractor. The Vreeland Company alone appeals. The question whether there was performance was stoutly contested, but the evidence is sufficient to sustain the finding of the court in favor of the plaintiff. The appellant, however, makes, in addition [another point] against the judgment.

* * *

It is contended that the materials furnished were not for the improvement of the realty, but were chattels not affixed. The contract between the plaintiff and Commeau called for double cases with shelves, exhibition cases, partition base, cupboards, a platform, lockers, dressers, bulletin boards, and supply cases. It was required that the materials used in the construction of the various cases, lockers, railing, bulletin boards, etc., shall be of the same wood as the finish of the rooms in which they are installed. There is evidence that the shelves were measured with reference to the rooms and constructed to fit into the spaces, with the exception of one platform expressly made portable. These various articles were fastened to the realty by holdfasts, nails, screws, angle irons, and the like. Kellogg, the defendant's architect, testified that to remove the cases would do material injury to them and the wall; that the wall was not finished behind the cases. The question is whether in fact and intention

the work and materials have become part and parcel of the building. *Ward v. Kilpatrick*, 85 N.Y. 413, 39 Am.Rep. 674. Were the labor performed and materials furnished for the purpose of making a permanent accession to the realty? *Watts-Campbell Co. v. Yuengling*, 125 N.Y. 5, 25 N.E. 1060.

Referring to machinery, the court in *Buchannan v. Cole*, 57 Mo. App. 11, said: "The controlling question in such cases is, was the machinery furnished and received with the intention of forming integral parts of a building which was constructed for a certain purpose?"

In *Union Stove Works v. Klingman*, 20 App.Div., at page 451, 46 N.Y.S., at page 722, affirmed 164 N.Y. 589, 58 N.E. 1093, the court say: "While it is true that some portion of the material, for which recovery has been had, could have been removed without difficulty, notably the ranges, the object of the erection of the buildings and the circumstances surrounding their purchase, and their annexation to the freehold, are sufficient to support the conclusion that it was the intent of the parties that they should be annexed to the realty and pass as fixtures."

The structure was exclusively designed for a public library and devoted to such purpose. The material furnished is all adapted to such a structure, and much of it, e. g., shelves, cases, and the like, could not be used save in like structures. It was constructed to harmonize with the building, and both fitted and fastened to it. The building could not be used for library purposes without it or like equipment. Indeed, the witness Rieser testifies: "I don't think that building and the walls would be complete without those particular fixtures; it wouldn't be a library, it would be a room."

The inquiry in such a case approaches nearly the doctrine of fixtures. *Ward v. Kilpatrick*, supra. In *Grosz v. Jackson*, 6 Daly, 463, the court held, in consideration of the fact that the structure was a theater, that chairs adapted and screwed down in the auditorium for the use of the audience were subject to a mechanic's lien. So desks and platforms in a public school were considered as fixtures. *Held v. City of New York*, 83 App.Div. 509, 82 N.Y.S. 426. And likewise shop shelves set up so as to conform to the building. *Rinzel v. Stumpf*, 116 Wis. 287, 93 N.W. 36. And the court found upon the conflicting evidence

that the said work and materials were actually used in and upon the building on the premises, and, "if there was any evidence to sustain such finding, it followed that the plaintiff was entitled to a lien." Nason Ice Machine Co. v. Upham, 26 App.Div. 422, 50 N.Y.S. 197. * * *

The judgment must be affirmed, with costs. All concur.

SCHMELING et al. v. ROCKFORD AMUSEMENT CO. et al.

Appellate Court of Illinois, 1910. 154 Ill.App. 308.

Mr. Justice THOMPSON delivered the opinion of the court.

On October 26, 1908, Andrew Ashton, the owner of a building known as the "skating rink," but at that time used as a garage, situated on lot 3, block 13, of the town of West Rockford, leased to the Rockford Amusement Company at a rental of \$125 per month the building and premises for a term of five years, commencing December 1, 1908, to be used "for a theater and other amusement purposes, and no other." The lessee was to be allowed the privilege of making such necessary changes in said building as would be required to equip it for the purposes of a theater, and the lessor was to allow to the lessee the sum of \$650 to be deducted from the rents at the rate of \$35 per month, to be used in making such changes and equipment. The Amusement Company entered into possession, remodeled the building, and equipped it with the necessary scenery, including electrical apparatus. The amusement company contracted obligations of about \$5,000 in remodeling and fitting the building for a theater, on which it paid about \$3,000 and failing to meet its obligations, Emil W. Schmeling filed a bill in chancery on March 17, 1909, to foreclose a mechanic's lien for work and material furnished in remodeling the building, for \$3,549.86, on which \$2,000 had been paid. * * * The case was heard before the court and a decree entered finding that Ashton, the owner of fee, had made the lease as alleged and had permitted the premises to be improved with full knowledge that the improvements were being made so far as concerns the parties claiming liens; that the complainant is entitled to a lien for a balance unpaid of \$1,549.86; * * *

It is * * * insisted that the materials furnished by the appellees and the work done were not of such a character as to entitle the appellees to mechanic's liens. * * * [As to the portion of the lien claim covered by work done and material furnished in permanently wiring the building for electricity, the material that could not be removed without tearing the building in pieces, there can be no question but that claimant is entitled to lien. The items of \$146 for one asbestos curtain, \$100 for one center door piece four wings and two set doors, with various other items of scenery, presents a question of a somewhat different nature. Permanent fixtures only are lienable.] The rule for determining what constitutes a fixture adopted by the courts of this state is:

"First, real or constructive annexation of the thing in question to the realty; second, appropriation or adaptation to the use or purposes of that part of the realty with which it is connected; and third, the intention of the party making the annexation to make it a permanent accession to the freehold, this intention being inferred from the nature of the article affixed, the relation and situation of the party making the annexation and the policy of the law in relation thereto, the structure and mode of the annexation, and the purpose or use for which the annexation has been made." Fifield v. Farmers' National Bank, 148 Ill. 163, 35 N.E. 802, 39 Am.St.Rep. 166.

Under the lease made between the [owner] appellant and the Rockford Amusement Company [the owner gave his consent that the building should be remodeled, therefore a lien for such remodeling was properly chargeable against his property. On the question whether the materials furnished were lienable, the proof shows that the Rockford Amusement Company] bought the scenery in question [from the lien claimant] and had it manufactured specially for this theater; the blocks enclosing the pulleys by which the scenery was operated * * * were nailed fast to the building and were a part of it. * * * The asbestos curtain is fastened to the blocks by endless wire rope and to remove the scenery it would be necessary to remove the blocks and pulleys which are solidly nailed to the building. The scenery is not suitable for use in any other theater except one of the same dimensions as this, and was bought solely for use in this theater and

intended for use therein, and each piece is complementary to and a necessary part of the whole, to be used as an entirety. * * *

The proof shows that the fixtures and apparatus furnished, for which liens were allowed, were so attached and used as to become a part of the theater building. Under such a state of facts the appellees were entitled to a lien therefor. Haas Electric & Mfg. Co. v. Springfield Amusement Park Co., 236 Ill. 452, 86 N.E. 248, 23 L.R.A.,N.S., 620, 127 Am.St.Rep. 297. The decree is therefore affirmed. * * *

SECTION 3.—PUBLIC IMPROVEMENTS

Mechanics' liens may not be acquired against property belonging to the public. If the services rendered or the materials furnished are for the construction of a building on behalf of a county, township, school district, sanitary or drainage district, city, or state, the persons furnishing such services or materials do not have the protection of a lien. The reason for this ruling of the courts is that, since the interests of the public are paramount, property belonging to the public should not be subjected to liens.

In order to give some protection, however, to those persons whose labor and materials are expended in making public improvements, the mechanic's lien statutes of many states give a lien upon the money due the general contractor. A typical section creating such a lien is as follows:

"Any person who shall furnish material, apparatus, fixtures, machinery or labor to any contractor having a contract for public improvement for any county, township, school district, city or municipality in this state, shall have a lien on the money, bonds or warrants, due or to become due such contractor under such contract: Provided, such person shall, before payment or delivery thereof is made to such contractor, notify the official of the county, township, school district, city or municipality whose duty it is to pay such contractor of his claim by written notice. * * * The person so claiming a lien shall, within thirty days after filing notice, commence proceedings

* * * to enforce his lien. * * * It shall be the duty of the said official, after the notice has been filed with him, to withhold payment of a sum sufficient to pay the amount of such claim, for the period limited for the filing of suit (thirty days). * * * Any officer violating the duty hereby imposed upon him shall be liable on his official bond to the claimant serving such notice for the damages resulting from such violation. * * *

Thus a claimant may have a lien upon money, bonds, or warrants due or to become due the general contractor. It is to be noted that the claimant cannot have such a lien, however, unless he shall notify the public official whose duty it is to pay the contractor. It is therefore of the utmost importance that the claimant shall see to it that this written notice is delivered to the proper official, charged with the payment of the public money to the general contractor.

CHAPTER 4

PROCEEDINGS TO OBTAIN LIEN

Section

1. What is Required of the Contractor.
 2. What is Required of the Subcontractor.
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SECTION 1.—WHAT IS REQUIRED OF THE CONTRACTOR

1. CONSENT OF THE OWNER

Since the lien sought to be imposed upon the owner's property, a contract for an improvement made with anyone other than the owner, as for example a tenant under a lease, cannot result in a lien without a consent by the owner to the repair or improvement. Generally an affirmative consent is a condition to the lien. In some states by statute, if it appears that the owner knew of the work being done and failed to notify the contractor of his dissent to a lien, his silence is implied consent.

P. DELANY & CO. v. DUVOLI et al.

Court of Appeals of New York, 1938. 278 N.Y. 328, 16 N.E.2d 354.

Action to foreclose a mechanic's lien on real property by P. Delany & Co. v. Rosanna Duvoli and Frances Labes. Judgment for plaintiff below.

Revised and dismissed.

[Defendant Frances Labes, owner of the land in question, leased it for a year with an option to buy given to the other defendant. P. Delany & Company were hired by the tenant to repair the buildings and brought this action to foreclose mechanics liens against the property.]

O'BRIEN, J. The question of law is whether there is any evidence of such a consent by defendant Labes, the record owner of the premises, to the improvements by the tenants in possession as satisfied the provisions of section 3 of the Lien Law (Consol.Laws, ch. 33). This section provides:

"A contractor, subcontractor, laborer or material man, who performs labor or furnishes materials for the improvement of real property with the consent or at the request of the owner thereof, or of his agent * * * shall have a lien for the principal and interest, of the value, or the agreed price, of such labor or materials upon the real property improved or to be improved and upon such improvement, from the time of filing a notice of such lien as prescribed in this chapter."

The consent required by this section is not a mere acquiescence by the owner to improvements by a lessee in possession at his own expense. There must be some affirmative act by the owner. *Beck v. Catholic University of America*, 172 N.Y. 387, 392, 393, 65 N.E. 204, 60 L.R.A. 315; *Brigham v. Duany*, 241 N.Y. 435, 440, 150 N.E. 507. Here there has been no compliance with the statutory requirements. The most that can be said in favor of respondents is that the owner did not object to improvements by the tenants at their own expense. That the lienors never dealt with the record owner or her agent in respect to those improvements cannot be doubted. The evidence demonstrates that the credit accorded by the lienors was to the tenants and not to the owner, that all the transactions relating to the improvements occurred between the lienors and defendants Samuel Salamone and Nunzio Salamone, the tenants in possession, and that the tenants assured the owner that the improvements were to be effected at their own expense.

The judgments should be reversed and the complaint dismissed, with costs in all courts.

2. THE NOTICE OF CLAIM FOR LIEN

Notice of claim for lien must be filed by the contractor for record within a stated time, as a condition precedent to the existence and enforcement of a mechanic's lien. The time within which notice must be filed varies in the several statutes from thirty days to four months after completion.

In order that the contractor may obtain a lien against the building or improvement into which he has put his materials, or services, or both, to secure the payment of the contract price, the statutes generally require that he file for public record, within a designated time, an instrument showing that a lien on the described property is claimed by him. This instrument is variously called the "claim for lien," or the "notice of claim," or the "notice of lien." Usually this notice of claim must be verified by the sworn affidavit of the claimant.

This act of publicly recording a sworn notice of claim is a condition precedent to obtaining a lien by the contractor; and it is important to note that by "contractor" is meant the man who sells *directly*, or renders services *directly*, to the owner; that is, contracts with the owner. Thus a notice of claim may be required of the materialman, the architect, the engineer, the superintendent, the builder, or even of the mechanic or laborer, provided each or any of these contracts directly with the owner. Only the relationship of owner and contractor is here involved, and under this subject we should not confuse that of owner and subcontractor.

The usual statutory requirement of the notice of claim for lien is as follows:

"No contractor shall be allowed to enforce such lien against or to the prejudice of any other creditor or incumbrancer or purchaser, unless within four months after completion, or if extra or additional work is done, * * * within four months after the completion of such extra or additional work, * * * he shall either bring suit to enforce his lien therefor or shall file with the clerk of the circuit court in the county in which the building * * * or improvement to be charged with the lien is situated, a claim for lien, verified by * * * affidavit, * * * which shall consist of a brief statement of the contract, the balance due after allowing all credits, and a sufficiently correct description of the lot * * * or tract of land to identify the same. Such claim for lien may be filed at any time after the contract is made, and as to the owner may be filed * * * within two years after the completion of said contract. * * *" Laws Ill.1903, p. 233, § 7, Smith-Hurd Stats. c. 82, § 7.

As mentioned above, the lien acts of nearly all the states provide for the filing of the claim for lien, but they differ as to the length of time for filing, and at what point the stated time begins to run. On this point it is necessary to consult the statute of the particular state within which the improvement is located. As to the length of time for filing, the usual limits are four months, sixty days, thirty days, or twenty days. The Mechanic's Lien Act of Illinois, from which the above section is quoted, provides for two periods, one of four months, applicable to the priority of the contractor's lien over those of "other creditors or incumbrancers or purchasers," and one of two years' duration, within which, as to the owner alone, the contractor may obtain his lien by filing the required notice. The four months period is sometimes referred to as "the four months secret lien," referring to the fact that for four months after completion of the construction the public records may fail to disclose the fact of liens upon the premises, although in fact such liens may exist, and may be perfected by filing the notice even at the very end of the four months period. It is therefore advisable for a prospective purchaser or mortgagee of a newly completed building to require from the owner waivers of lien from the contractors, or a bond securing him from possible lien claims.

3. WHEN THE TIME TO FILE BEGINS TO RUN

The lien statutes of the different states differ also as to the point when the stated time within which the notice of lien may be filed begins to run. In the Illinois act, the period commences upon the "completion of the contract," and many states have a similar provision. Just what is completion of the contract is, however, sometimes difficult to decide. Questions arising in the interpretation of this provision are considered in the cases following.

CHICAGO LUMBER CO. v. MERRIMACK RIVER SAV. BANK.

Supreme Court of Kansas, 1893. 52 Kan. 410, 34 P. 1045.

ALLEN, J. This action was brought by the Chicago Lumber Company to foreclose a mechanic's lien filed August 7, 1887,

on a quarter section of land, and an unfinished mill situated thereon. The plaintiff's claim is for materials furnished by them to Douglass & Bixby, the owners of the property. The first item was furnished, as appears from the bill attached to the statement for a lien, on November 7, 1882, and the last item on December 13, 1883. The defendant bank claims under a mortgage dated June 29, 1883, for \$8,000. There was a prior mortgage on the land in controversy for \$1,000, * * *. It appears that the last work was done on the mill building late in the fall of 1884, and that it was then left in an unfinished condition, and has so remained ever since.

Various matters are discussed in the briefs by both parties, which under the view we take of the case, it is unnecessary to mention. The statute under which the lien is claimed provides that the statement shall be filed within four months after the completion of the building. It appears that this building never was, in fact, completed; but it has been held by this court, and is certainly consistent with the spirit of the law, that, where the work is abandoned, parties entitled to a lien shall not be thereby deprived of their rights nor prevented from enforcing them, but that when the work is abandoned the building shall be deemed completed for the purpose of protecting their rights. In *Shaw v. Stewart*, 43 Kan. 572, 23 P. 616, it was said: "All the authorities sustain the proposition that if the abandonment of the work upon the building had been caused by Stewart, the owner of the property, plaintiffs would be entitled to their liens, as the abandonment of the work would have been deemed a completion of the work for the purpose of filing such liens. *Catlin v. Douglass*, 33 F. 569; *Trammell v. Mount*, Mo. Sup. 4 S.W. 377." See, also, *Perry v. Conroy*, 22 Kan. 716; *Crawford v. Blackman*, 30 Kan. 527, 1 P. 136.

The plaintiff in error strenuously contends that the abandonment does not take place until the owners have arrived at the mental conclusion that they cannot proceed with the work. If this construction of the law were to be adopted, parties entitled to a lien would find themselves in a very precarious predicament. It might be a matter of very great difficulty to keep track of the mental operations of the owners, who in most instances would be interested in defeating, rather than in maintaining, liens upon their property. If one may cease to work on a build-

ing when partially completed, and leave some portion unfinished with the purpose and intention of proceeding with the work at some future and indefinite period, the time when laborers, contractors, and material men may enforce their demands will be indefinitely postponed, and they will be put in the most hazardous position of being defeated ultimately of their liens if they fail to file them within the time prescribed by the statute, or being defeated in a suit if the work be thereafter resumed. We think the contention of the plaintiff in error that abandonment of work on this mill is a mental act of the owners is unsound; that it is a physical, visible condition, to be determined from an inspection of the premises. When Douglass & Bixby ceased to do anything towards the completion of their building they abandoned the work, no matter how much they may have hoped, expected, or intended to be able to resume, if subsequent events show that they never did in fact resume work. If the owner temporarily suspend work on the building, and thereafter resume, no doubt liens might be taken within the statutory period after completion of the work; and, if it were a fact in this case that the owners had resumed work for the purpose of completing the building as originally planned, a different question would be presented. It is immaterial what the cause of the abandonment may have been. * * * Work was actually abandoned late in 1884. If we were to say that the statement which was filed by the plaintiff on the 7th day of August, 1887, more than two and a half years later, was in time, it seems to us that the limit prescribed by the statute would be practically construed away, and that no one could ever determine when to file his statement, or when the time for filing liens had expired.

* * *

SHAW et al. v. FJELLMAN et al.

Supreme Court of Minnesota, 1898. 72 Minn. 465, 75 N.W. 705.

CANTY, J. This is an action to foreclose a mechanic's lien, and the question raised is whether the lien statement was filed within the statutory time. The complaint alleges that the defendant Fjellman was the owner of the land on which he was erecting a building; that on March 30, 1895, he entered into an agreement with plaintiffs whereby it was agreed that they should

furnish, place, and construct "a plumbing and heating plant" in the building, complete said plant in a good and workmanlike manner, "keep and maintain the same in good and perfect condition for one year from the date of the completion" of the same and its acceptance by Fjellman, and execute to him a written guaranty to that effect, and that, in consideration thereof, he agreed that at the end of such year, on the full performance by plaintiffs of said contract on their part, he would pay them the sum of \$1,075; that plaintiffs commenced the construction of said plant March 31, 1895, and the same was completed December 31, 1895, and accepted by Fjellman January 10, 1896; that, on the latter date, plaintiffs executed a written guaranty pursuant to the contract, and, in performance and fulfillment of the same during the year in which said guaranty was in force, furnished labor and material rendered necessary in order to maintain the plant and keep it in repair; that said repairs were furnished June 8, 1896, November 19, 1896, and December 31, 1896, all of which are set out in a bill of particulars made a part of the complaint. The lien statement was filed March 13, 1897. It is further alleged that the defendants Busch and Anheuser-Busch Brewing Company claim some interest in the property superior to the right of plaintiffs. These two defendants demurred to the complaint, on the ground that it does not state a cause of action; and, from an order sustaining the demurrer, plaintiffs appeal.

The statute (section 6236, Gen.St.1894) requires the lien statement to be filed within 90 days after the time of furnishing the last item of the labor or material, and respondents contend that in this case the lien statement was not filed within the 90 days; that, in order to preserve a lien for the labor and material furnished in constructing the plant, a lien statement therefor should have been filed within 90 days after the same was completed; and that the time for filing the lien statement for the same cannot be extended by reason of the labor and material furnished in maintaining the plant and keeping it in repair afterwards. As against Fjellman, who made the contract, the lien statement was, in our opinion, filed in time. Of course, the stipulation for maintaining the plant for one year did not of itself extend the time for filing the lien. On the contrary, this extension of the time of payment, if no additional labor or material had been furnished, would have waived the right to a

lien for what had been done. *Flenniken v. Liscoe*, 64 Minn. 269, 66 N.W. 979. But, when plaintiffs entered into the contract they took their chances as to whether or not it would be necessary to furnish, during the year, additional labor or material for which a lien might be claimed, and, if none was so furnished within 90 days of the end of the year, the lien for the whole claim would be waived.

The contract to construct the plant, and maintain it for one year after it was constructed, was, as between plaintiffs and Fjellman, one entire contract, even though it provided that a written guaranty should be executed when the original construction was completed. As against Fjellman, who made the contract, it is an entirety, and the lien statement was, as against him, filed in time to preserve the lien for the whole claim. But as to an innocent third party, who, after the plant was completed acquired an interest in the property, without actual notice or knowledge of the character of the contract, it should be regarded as in fact two separate contracts, one of which was to be completely performed before the performance of the other was to be commenced, and that, as to such a third party, the lien statement was not filed in time. If, by one contract, A. should employ B. to construct a house on the land of the former, and at the end of six months, after the house was fully completed, to commence the construction of a barn on the same land, and thereafter construct the same, it might, as between the parties, be an entire contract, requiring the filing of but one lien statement, while as to such third parties it might, for some purposes, be regarded as two separate transactions, so that the time for filing the lien statement for each job or transaction would commence to run from the time of completing the same.

The same principle may apply in this case. As against a mechanic's lien, the rights of subsequent purchasers and incumbrancers are not, as a general rule, any greater than the rights of the owner who contracted for the improvement. But there are exceptions to this rule. Thus, after it was supposed that the work had been completed, and it was accepted or taken possession of by the owner, he or his agent may extend the time for filing the lien by requiring additional work to be done to remedy defects subsequently discovered, and the time for filing the lien will commence to run from the completion of such addi-

tional work. *National Stock Yards v. O'Reilly*, 85 Ill. 546; *Water-Supply Co. v. Riter*, 138 Ind. 170, 37 N.E. 652; *McIntyre v. Trautner*, 63 Cal. 429. But after the work has been apparently completed, and all further work has ceased, for an unreasonable length of time, and in the meantime a third party has acquired a right or interest in good faith, for a valuable consideration, the owner who made the contract may thereafter waive his own rights, and extend, as against himself, the time for filing a lien by consenting to the performance of further work to remedy such defects; but he cannot waive the rights of such a third party, or extend the time of filing a lien as against him. *Nichols v. Culver*, 51 Conn. 177; *Cole v. Uhl*, 46 Conn. 296; *Sanford v. Frost*, 41 Conn. 617; *Conlee v. Clark*, Ind.App., 42 N.E. 762.

In our opinion, the same principles apply here. But the burden is on these respondents to show that they are innocent purchasers or incumbrancers for value, without notice; and, until that appears, they stand in no better position than Fjellman himself. * * *

This disposes of the case, and the order appealed from is reversed.

SECTION 2.—WHAT IS REQUIRED OF THE SUBCONTRACTOR

1. THE NOTICE TO THE OWNER

The proceedings to obtain a lien which are required of the subcontractor differ from those which the contractor must follow, in that the notice of claim for lien of the subcontractor, in addition to being filed for public record, must be served personally upon the owner. The lien statutes generally contain provisions similar to the following:

"Subcontractors, or party furnishing labor or materials, may, at any time after making his contract with the contractor, and shall within sixty days after the completion thereof, cause a written notice of his claim and the amount due or to become due thereunder, to be personally served on the owner or his agent or architect, or the superintendent having charge of the building or improvement."

A direct lien is given to the subcontractor and to sub-subcontractors, the essential thing required being personal service of the notice thereof upon the owner. By subcontractor is meant the person who contracts, not with the owner, but with the principal contractor. Such person may be the dealer in materials, the laborer, the mechanic, etc. Wherever the subcontractor is in any doubt as to the honesty or solvency of the principal contractor, he should, at any time after the contract is made between the subcontractor and the contractor, give the written notice of claim for lien to the owner of the amount to become due him, and thus protect himself by the security of a lien. The notice may be very informal, so long as it is in writing, and contains a statement of the work for which claim is made, the amount of the claim, and a description of the property upon which the work or materials are to be, or have been, expended.

2. THE TIME WITHIN WHICH THE NOTICE MUST BE SERVED

BOOTH v. VON BEREN.

Supreme Court of Connecticut, 1909. 82 Conn. 298, 73 A. 775.

On October 1, 1907, one Humphrey, a builder, entered into a written agreement with the defendant Von Beren to build a house for the latter for the sum of \$5,475, for which there is now due Humphrey under the contract the sum of \$1,275. Mansfield, a dealer in building materials, furnished to Humphrey the lumber used in Von Beren's house; and Mansfield has filed an interpleader in this suit claiming a lien upon the property in the sum of \$827, praying that out of the money due Humphrey from Von Beren his lien be satisfied. The question is whether Mansfield has satisfied the statutory requirements so as to be entitled to a lien. It appears from the evidence that Mansfield commenced to deliver material upon the order of Humphrey at the Von Beren house October 21, 1907, and ceased to deliver material to, or render any services in, the construction of said house on December 27, 1907. On March 25, 1908, Mansfield gave notice to Von Beren of his intention to claim a lien for the materials furnished.]

HALL, J. [Mansfield was a subcontractor.] * * * To acquire a valid lien for the materials which he furnished it was therefore necessary for him to comply with the provisions of section 4137 of the General Statutes [of 1902. This section required him] after commencing, and not later than 60 days after ceasing to furnish the materials, to give written notice to the owner of his intention to claim a lien therefor on said building. * * * He actually furnished no materials to Humphrey after December 27, 1907, [and he did not serve the notice of claim for lien upon Von Beren until March 25, 1908. He therefore did not serve the notice within the time required by the provisions of the mechanics' lien law, and is not entitled to a lien.] * * *

CHAPTER 5

RIGHTS AND DUTIES OF THE OWNER, CONTRACTOR, AND SUBCONTRACTOR

Section

1. Rights and Duties of the Owner.
 2. Rights and Duties of the Contractor.
 3. Rights and Duties of the Subcontractor.
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SECTION 1.—RIGHTS AND DUTIES OF THE OWNER

It is the duty of the owner to require from the contractor, before payment for the work, an affidavit listing the names of all persons furnishing materials or labor to whom money is due. Failure to secure the affidavit, or failure to withhold the moneys shown to be due, makes the owner liable for the listed debts.

The owner is required further to secure a similar affidavit from any subcontractor who is shown by the contractor's affidavit to have payment due.

The owner is protected as to payments made in reliance upon the required affidavits, unless a notice of claim for lien has been directly served on him.

Duty to Require Affidavit from Contractor.—The owner, before paying the contractor, must secure from him a statement, in writing and under oath, of the names of all parties furnishing materials and labor and of the amounts due or to become due to each. If it appears from this affidavit that there are sums due or to become due such subcontractors, materialmen, mechanics, or laborers, it is the duty of the owner to retain from any money due the contractor an amount sufficient to pay all such demands. And it is the further duty of the owner to pay over the money so retained to the parties entitled thereto.

Effect of Failure to Comply with This Requirement.—If the owner fails to secure from the contractor this affidavit, or if,

where the affidavit is furnished, the owner pays the contractor the amount due him, without retaining sufficient money to satisfy the claims shown by the affidavit due to subcontractors, such payment by the owner is wrongful, and will not protect him; that is, in such case the owner will have to pay twice. Such wrongful payment will leave him open to the liens of the subcontractors shown in the affidavit.

Owner's Duty to Require Similar Affidavit from the Subcontractor.—Where the affidavit of the contractor shows sums due or to become due to a subcontractor to whom all or a portion of the contract has been sublet, it is the further duty of the owner to require from the *subcontractor* a similar affidavit, containing a statement of the persons furnishing him labor and materials, giving their names and the sums due or to become due to each of them, and to retain from the sum he is about to pay over to the subcontractor an amount sufficient to cover their claims, and to pay over the money so retained to these sub-subcontractors.

Right of Owner to Rely upon the Affidavit.—Where the owner has secured the required affidavit from the contractor or subcontractor, before paying the sums due, the owner is fully protected by the payment, unless he has been directly notified by the subcontractors or sub-subcontractors.

Where the affidavit submitted is false, as failing to show amounts due to subcontractors, nevertheless the owner will be protected from the liens of such subcontractors by his payment to the contractor, for the owner may rely absolutely upon the affidavit, provided he has not been notified directly by the subcontractors of their claims.

SECTION 2.—RIGHTS AND DUTIES OF THE CONTRACTOR

The contractor is entitled to a lien on the property as security for payment of the contract price provided that within the time fixed by the statute (usually four months) he either starts suit on his lien claim or files for record a sufficient notice of his lien.

The contractor is under a duty to furnish to the owner the sworn affidavit containing the names of all parties furnishing labor and materials, and the amounts due or to become due to each. Performance of this duty is a condition to his right to receive final payment.

Contractor's Duty to File for Record Notice of Claim for Lien.

—As discussed in the preceding chapter, where the contractor seeks to establish a lien which will be prior to other incumbrances, he must, within four months of completion of his contract, either start suit upon his lien claim, or file for record with the proper county official a sufficient notice of claim for lien. The reason for this provision is so that prospective purchasers or mortgagees of the property may be informed that the owner's rights therein are subject to lien. As to the owner himself, the suit or notice of claim will be in time, if filed within two years of completion of the contract.

Contractor's Duty to Furnish Affidavit.—As stated in the preceding section, it is not only the duty of the owner to require, but also the duty of the contractor to furnish, a sworn statement of the names of all parties furnishing material and labor, and the amounts due or to become due each. Not until he has furnished the owner this affidavit has the contractor any right against the owner for the money due on the contract.

SECTION 3.—RIGHTS AND DUTIES OF THE SUBCONTRACTOR

The subcontractor is entitled to a lien on the property as security for payment provided he serves notice upon the owner within the fixed time after completion of his contract. This is in addition to his right against the principal contractor on the contract.

Subcontractor's Duty to Serve Notice of Lien on Owner.—Where the contractor furnishes to the owner an honest and correct affidavit of the names and sums due all subcontractors, this is sufficient to protect the subcontractors, as it is unlikely that the owner will neglect to retain out of the money due the con-

tractor an amount sufficient to pay the subcontractors' claims. But should the original contractor, in giving this statement to the owner, either through fraud or mistake, fail to include the amount, or a part thereof, due to any subcontractor, and the owner, relying upon the affidavit of the original contractor, pays him according to said affidavit, the subcontractor will lose his claim upon the owner accordingly, unless the subcontractor has given the notice of his claim directly to the owner. Subcontractors, whether they be materialmen, laborers, superintendents, or engineers employed directly by the contractor, should not depend upon the accuracy and honesty of the principal contractor, but should notify the owner directly of their claims, as already discussed in section 2, chapter 4.

Subcontractor's Rights Against Owner and Contractor.—The rights of the subcontractor against the contractor are upon the contract existing between them, and are determined by the principles of the law of contracts. But in addition to his rights against the contractor, by virtue of the special provisions of the lien law, the subcontractor also has rights against the owner, even though he has not contracted with him. Where the owner is notified of the name of the subcontractor and the amount due him from the principal contractor, either by the affidavit of the principal contractor or by the notice of claim served directly upon the owner by the subcontractor himself, he has a right against the owner to secure payment of the amount due him. As already stated, if the subcontractor can prove service of the notice of claim upon the owner before the owner has paid the principal contractor, the subcontractor may demand payment of his claim direct from the owner.

It is most important to note that, although the subcontractor has sixty days from the completion of his contract within which to serve his notice of claim upon the owner, if before that time the owner has paid the principal contractor in full, after having secured an affidavit from the principal contractor which fails to show this subcontractor's claim, the owner will be free from all claim of lien on the part of the subcontractor. Here the notice to the owner, though within the sixty days, is too late.

BERKSHIRE WAREHOUSE CO. v. HILGER & CO. et al.

Supreme Court of Illinois, 1915. 268 Ill. 463, 109 N.E. 287.

CARTER, J. [This was an action by the Edward Hines Lumber Company, an intervening petitioner, against the Berkshire Warehouse Company, to enforce an alleged mechanic's lien for materials furnished Hilger & Co., general contractors.]

In July, 1909, appellee made a contract with Hilger & Co., a general contractor in Chicago, to construct certain improvements for \$75,000 on the premises owned by appellee. Work was begun under this contract July 8, 1909, and continued, various subcontractors furnishing labor and material. Hilger & Co. was paid by appellee on this contract on August 9, 1909, \$2,500, August 20, \$2,500, and September 4, \$5,000, without requiring, at the time these payments were made, statements to be furnished by Hilger & Co., as provided by section 5 of the mechanic's lien law of 1903. Laws 1903, p. 232, Smith-Hurd Stats. c. 82, § 5. August 16, 1909, appellant entered into an agreement with Hilger & Co. to furnish lumber and building material for use in the erection of the improvement on said premises, no particular quantity being ordered at that time, and no definite price being fixed therefor, except that the orders were to be given from time to time as the materials were needed, at the then market price. September 28, 1909, appellee received from Hilger & Co. a sworn statement in accordance with said section 5 of the mechanic's lien law, and thereafter, under this statement, paid \$17,000. On October 22d Hilger & Co. furnished another sworn statement, under which it was paid \$15,000; and on November 16th it made another statement, as required by the Mechanic's Lien Act, under which it was paid, November 18th, \$16,000. The name of appellant did not appear on either of these three statements as furnishing material or doing work on the contract. * * *

The principal question requiring our consideration is whether the failure to make the statements required by the statute, before the said payments of August 9th and 20th and September 4th were made, renders the property of appellee subject to a mechanic's lien up to \$10,000, the amount of those payments.

* * * In the recent decision of Knickerbocker Ice Co. v. Halsey Bros. Co., 262 Ill. 241, 104 N.E. 665, this court, in con-

struing said section 5 of the mechanic's lien statute, held that said section did not limit a contractor to one sworn statement to be made to the owner; that the conditions of the contract may change between the time of payments; that "new subcontracts may have been entered into in the meantime or payments may have been made upon subcontracts existing at the time the first payment was made. In order to be apprised of the exact situation at the time any payment is demanded by and made to the contractor, whether it be the first payment made under the contract or any subsequent payment, the owner is entitled, under said section 5, to require, and it is the duty of the contractor to make, a statement showing the situation as it then exists. If any subcontractor is not satisfied to rely upon the contractor in the making of these statements and to abide by the statements as made, it is his privilege, under the statute, to serve an independent notice upon the owner, of the amount due or to become due under his subcontract, which shall bind the owner notwithstanding any statement made by the contractor."

The opinion further holds that, in the absence of a notice by the subcontractor, the owner has a right to rely upon the sworn statement of the contractor unless he knows from other sources that such statement is false. * * *

On November 16, 1909, the last time a statement by Hilger & Co. was filed in accordance with the requirements of section 5 of this statute, appellee had on hand ample funds to pay the claim of the appellant. That statement showed that there was due and owing contractors and materialmen \$23,874.08, and the record shows appellee still owed on the contract approximately \$27,000. Appellant's claim amounts to only \$857.57, and it could have protected that claim by filing notice, as the statute provided, before this money was paid out, but it did not serve such notice until January 20, 1910, at which time, under said statement of November 16, 1909, the appellee had paid out the money to the contractor and subcontractors.

At the time of the first payment here in question, August 9, 1909, there was no money due or owing to appellant. Neither would it have been possible to figure out, at the date of payments on August 20th and September 4th, what was due or to become due appellant, as the record does not show that it had delivered

any material previous to either of those dates. Indeed, had statements been required on those dates, and had appellant's claim been referred to in any way on such statements, it would not have protected appellant's claim in any manner, in view of the fact that the subsequent statements made in conformity with the statute, September 28th and November 16th, did not contain any reference to the claim. Appellee had a right to rely on those statements. Obviously, appellant was not injured in any way by the failure of the appellee to require the filing of statements before making the payments of August 9th, August 20th, and September 4th, respectively. The appellate and trial courts properly construed the statute on the question here under consideration.

The judgment of the Appellate Court will be affirmed.

Judgment affirmed.

CHAPTER 6

ENFORCEMENT OF LIENS

Section

1. Remedies of the Contractor.
 2. Remedies of the Subcontractor.
 3. Priorities.
-

SECTION 1.—REMEDIES OF THE CONTRACTOR

Upon performance, the contractor has the following remedies against the owner: (1) He may sue on the contract in an action at law for a judgment for the amount due; (2) he may bring an action in equity to enforce his lien by sale of the property. Both remedies may be pursued concurrently.

Remedy at Law for Breach of Contract.—If payment of the amount provided for in the building contract is not made to the contractor by the owner when due, the owner is in default as having broken the contract. The contractor may then, of course, sue the owner at law for the money due him; but this remedy will only give him a judgment, and the general lien of such judgment against the owner's property, after which a levy and sale to satisfy the judgment will still be necessary.

Remedy in Equity of Foreclosure.—The building contractor, however, already has a specific lien against the particular improvement, by virtue of the mechanic's lien law; and this statute gives him an immediate right against the specific property of the owner, a right to apply to a court of equity for a decree of sale of the property and from the proceeds thereof to pay the contractor. This right is called a right of foreclosure, and the procedure is similar to the foreclosure of a mortgage.

SECTION 2.—REMEDIES OF THE SUBCONTRACTOR

Upon performance, the subcontractor has the following remedies: (1) An action at law for the contract price against the contractor, and also against the owner where the lien statute of the state creates this action; (2) an action in equity for foreclosure of lien by forced sale of the property.

Remedy in Equity of Foreclosure.—The subcontractor, whether he be a materialman, mechanic, laborer, engineer, or superintendent, has the same remedy of foreclosure of his lien as has the contractor. He, too, may apply to a court of equity for a forced sale of the owner's property, and payment of the subcontractor's claim out of the proceeds.

Remedy at Law of Judgment Against Owner.—In addition, many lien statutes give the subcontractor an action at law against the owner, providing that by joining both the contractor and owner as codefendants in the same suit he may get judgment against both. The right of action against the contractor arises, of course, out of his contract; but that against the owner is created solely by the lien statute.

Conditions Precedent to Enforcement of Liens.—It should be borne in mind that, since the contractor's and subcontractor's rights of equitable foreclosure against the owner's property, and the subcontractor's right to sue the owner, are all rights created solely by the mechanic's lien statutes, the provisions of these statutes as hereinbefore discussed, as to acquiring the lien, must be strictly adhered to. In any suit at law or in equity to enforce a mechanic's lien, the lien claimant must, of course, prove that he has served the required notices and fully performed the services or delivered the materials requisite to entitle him to a lien.

SECTION 3.—PRIORITIES

The statutes governing mortgages and mechanics' liens of most of the states give to the mechanic's lien priority even over an already existing mortgage on land, to the extent of the value of the improvement effected.

As between various mechanics' lienors, all stand on an equality irrespective of priorities in date of filing, with the exception of claims for wages of laborers, which almost universally are accorded priority.

As Between Mechanics' Liens and Other Incumbrances.—A mechanic's lien has priority over a mortgage placed upon the property *after* the date of the contract for the materials and labor. As to mortgage already upon property at the time the owner lets the contract for the improvement, even here many lien statutes give the lien claimant priority as to the value of the *improvement*, over the mortgagee; although the latter will have priority in the value of the land. A quotation from such a statute may make this point clearer:

"No incumbrance upon land, though created before the making of the contract for the improvement, shall operate upon the building erected until a lien in favor of the persons having done work or furnished materials shall have been satisfied. * * * As between incumbrancers and lien creditors, all previous incumbrancers shall be preferred to the extent of the value of the land, and the lien creditor shall be preferred to the value of the improvements erected on said premises, and the court shall decide what proportion of the proceeds of any sale shall be paid to the several parties in interest. * * *"

In such provisions as above quoted the presumption is indulged that the improvements placed upon the premises have enhanced their value to the extent of the lien claim, and therefore the lien creditors are justly entitled to a prior lien for the amount of the new improvements which they have provided. Of course it is only where the sale price of the premises fails to bring the total amount of the liens and mortgage that the question of priorities arises.

As Between Different Mechanics' Liens.—As a general rule, all mechanics' liens, on the same property and arising out of the erection of the same building or improvement, irrespective of the date of filing, stand on an equality, and share pro rata in the amount realized from a sale of the property where the proceeds of such sale are not enough to pay all in full.

An almost universal exception to the above rule is found in favor of laborers. The claim of any person for wages as a laborer is usually made a preferred lien. A typical section so providing is as follows:

"Upon all questions arising between different contractors having liens under this act, no preference shall be given to him whose contract was made first, except the claim of any person for wages by him personally performed, shall be a preferred lien."

SOULE et al. v. BORELLI et al.

Supreme Court of Errors of Connecticut, 1908. 80 Conn. 392, 68 A. 979.

For many years prior to January 1, 1904, the plaintiffs, Turney Soule and George H. Lines, as sole copartners, under the name of T. Soule & Co., hereinafter referred to as Soule & Co., were engaged in business in New Milford as builders and dealers in lumber, hardware, and builders' material. D. E. Soule, the brother of Turney Soule, had for some years prior to April, 1904, been employed by the copartnership as foreman of construction. In that capacity he was accustomed to hire and have charge of the men, and to select and order the materials required. Immediately after the fire which on May 2, 1902, destroyed nearly all the business portion of New Milford, including a hotel owned, as was the land on which it stood, by Mrs. Borelli, the wife of the defendant Andrew Borelli, it was determined by Soule & Co. that they would thereafter take construction work only upon commission. * * *

A few days after the fire Mrs. Borelli, accompanied by her husband, * * * drove into the lumber yard of Soule & Co., and there had an interview with Mr. Lines, the junior partner. They asked Mr. Lines if his firm could promise them help to rebuild the destroyed hotel. Lines told her that, subject to other build-

ings that had to come in ahead, they would do so. Mrs. Borelli asked upon what terms, and how. Lines replied that they had decided to take no jobs except upon a 10 per cent. commission basis; that is, that they would furnish the labor and materials at cost, and add thereto 10 per cent. commission. Mrs. Borelli thereupon accepted the proposition of Lines to do the work upon these terms, telling him to go ahead as soon as they could.

On June 10, 1902, the firm, pursuant to this agreement and direction, began to furnish labor and materials in the erection of the building, and continued uninterruptedly to do so until it was completed on January 5, 1903. The last charge upon the account * * * showed an indebtedness to Soule & Co. of \$2,612.82, and on March 4, 1903, a lien was filed upon the property for said sum in favor of the plaintiffs. * * * August 11, 1902, Mr. and Mrs. Borelli mortgaged the premises in question to J. Le Roy Buck, conservator, to secure a note of \$5,000. Buck having died, the defendant Adeline Buck succeeded him in the execution of said trust.

October 10, 1902, the Borellis gave a second mortgage of said premises to the defendant Bennett to secure a note for the like sum of \$5,000. This note and mortgage were given for the purpose of raising money to pay bills in connection with the construction of said building, including that of Soule & Co. [Upon foreclosure and sale, the property brought less than the total of the mortgages and lien claims, and the sole question for decision here is that of priority.]

PRENTICE, J. * * * The lien, by the express provision of the statute, took precedence of any incumbrance originating after the contractor began to furnish materials. Gen.St. 1902, § 4135. This date was June 10, 1902. The first of the mortgages sought to be foreclosed was not placed upon the property until August 11, 1902. The lien is therefore entitled to priority over them. The fact that labor and material was furnished after the last mortgage was given, the value of which exceeded the amount found due upon the completion of the work, or that the payments to the contractor may have exceeded the charges upon its books at or subsequent to the date of either mortgage, or that the proceeds of a mortgage loan may have been used in making payments to the contractor which, when credited upon its books exceeded in

the aggregate the charges then thereon, or that the contractor knew that the money paid to him, with the result indicated, was the proceeds of such loan, would not, one or all of them, if established suffice to postpone the lien to the mortgage. The statute is too explicit to admit of any such construction. The contract was a single, indivisible one, comprehending all that was done, and its execution was unbroken in its continuity. By force of the statute there was embodied in it the power to charge the property, as of the time its execution was begun, for all the materials furnished and services rendered by virtue of it. * * *

CHAPTER 7

WAIVER OF LIEN

Section

1. Express Waiver.
 2. Implied Waiver.
 3. Effect of Breach on Waiver.
-

SECTION 1.—EXPRESS WAIVER

The right to a lien may be expressly waived by the contractor or subcontractor who would otherwise be entitled to the lien. Any such waiver is invalid unless supported by a consideration.

A general waiver of lien by the contractor in advance of construction may destroy the right of lien of subcontractors, materialmen and laborers where the written waiver is filed for public record.

In General.—The right to a lien, like other legal rights, may be waived by the person entitled to it. The waiver may be made by an express agreement of the parties, as where the contractor agrees in the original contract with the owner that he will not claim a lien upon the premises. In such case the contractor has given up his right to a lien, and thereafter his remedy for payment of the contract price is solely in an action at law on the contract.

Necessity for Consideration for Waiver.—Any waiver of lien, express or implied, must be supported by a consideration. Where the original contract contains a clause waiving liens, the consideration is found in the undertaking of the owner to pay the contract price. Where, however, an agreement to waive the right to a lien is entered between the owner and contractor after the signing of the contract, the promise to waive the lien right must be supported by a new consideration.

Statutory Provisions as to Waiver.—The lien statutes of many states contain provision for waiver by the general contractor

of all liens upon certain conditions; that is, where the original construction contract provides for delivery of the building or improvement free and clear of all liens, such a term operates as a waiver, not only of the lien of the general contractor, but also of the liens of subcontractors, laborers, materialmen, and sub-subcontractors. Such statutory provisions are conditioned upon the filing of this agreement to waive all liens in the office of the county recorder of the county where the improvement is situated, within ten days after the execution of the principal contract, or, as an alternative, actual notice of the waiver to subcontractors and materialmen. Such statutory provision is as follows:

“ * * * If the legal effect of any contract between the owner and contractor is that no lien or claim may be filed or maintained by any one, such provision shall be binding; but the only admissible evidence thereof as against a subcontractor or materialman, shall be proof of actual notice thereof to him before any labor or material is furnished by him; or proof that a duly written and signed stipulation or agreement to that effect has been filed in the office of the recorder of deeds of the county or counties where the improvement is situated, prior to the commencement of work on such improvement, or within ten days after the execution of the principal contract, or not less than ten days prior to the contract of the subcontractor or materialman. * * * ”

In other words, if the owner and the original contractor enter into a written agreement that the building shall be delivered free from all liens, the subcontractors and all others are denied the right of any lien, provided they either had actual notice of the waiver before they themselves contracted, or they had constructive notice by the filing of the waiver agreement in the public records not less than ten days prior to their contract with the principal contractor. The theory is that, if the subcontractor, after notice of the agreement to deliver the building free from all liens, still goes ahead and contracts with the contractor, this action indicates his assent to the agreement, and amounts to a waiver of his own right of lien.

PINNING et al. v. SKIPPER.

Court of Appeals of Maryland, 1889. 71 Md. 347, 18 A. 659.

MILLER, J. The mechanic's lien law provides that "no person having such lien shall be considered as waiving the same by granting a credit, or receiving notes or other securities unless the same be received as payment, or the lien be expressly waived." Code, art. 63, § 3. It is conceded that under this provision the lien may be waived by a special contract inconsistent with its existence or enforcement. Such a contract is, in effect, an express waiver of the lien. The lien claim in this case, amounting to \$991.56, was filed by the appellants against 22 brick houses built on contiguous lots of which the appellee was the owner or reputed owner and builder. The itemized account is for sand used in laying the bricks, for digging the foundations and cellars, grading the yards and pavements, of these houses, and for grading under back buildings.

It appears from the record that these lots owned by the appellee, and on which he intended to build these and other houses, contained a large quantity of valuable sand, and on the 21st of July, 1887, before any of the work was begun, he and the appellants entered into a special written contract. By this contract the Pinnings agreed (1) to do all the excavation necessary for the erection of 89 houses, more or less, on these lots, to grade the yards and alleys in rear of the same, to grade Castle street from Chew street to the alley in the rear of the houses to be erected on Eager street, and to furnish so much good sharp sand as may be necessary for the brick-work and plastering these 89 houses at 45 cents per 1,000 bricks, said 45 cents to include the plastering sand; (2) to do all this work and furnish this sand for the privilege of removing and selling the surplus sand for their own use; * * * (6) they agree to give to Skipper a good lien bond as a bar against liens upon said houses, or either of them, for work done or material furnished or for labor or hire; (7) to take a house or houses in full payment for the sand delivered as above mentioned; and should there be any balance due to Skipper they agree to pay the same to him. Skipper on his part agreed to give the Pinnings the surplus sand in consideration of their performance of the above work, and to give a good and sufficient deed of assignment to them for

the house or houses above mentioned. At the same time the Pinnings gave to Skipper their bond, with a surety therein, to which a copy of this contract was attached, in the penalty of \$1,000, conditioned for the faithful performance on their part of the terms and conditions of this contract.

There may be some difficulty as to the construction and effect of this contract in other respects, but we find none in determining that it is utterly inconsistent with the enforcement of a mechanic's lien against either of these houses by the appellants. The stipulation that they would give a bond "as a bar against liens upon said houses, or either of them," and the giving of the bond conditioned for the faithful performance of their part of the contract, clearly, in our judgment, constitute in law a waiver of the lien sought to be enforced in this suit. * * * If a party expressly contracts that he will not do a certain thing, or will not set up a certain claim against the other contracting party or his property by resort to a certain process, it seems to us a legal anomaly to say he can go on and do the thing. * * * In our opinion, therefore, the court below was right, in taking this case from the jury, and directing a verdict for the defendant by granting his first prayer.

Judgment affirmed.

SECTION 2.—IMPLIED WAIVER

WATERBURY LUMBER & CO. v. ASTERCHINSKY.

Supreme Court of Errors of Connecticut, 1913.
87 Conn. 316, 87 A. 739, Ann.Cas.1916B, 613.

RORABACK, J. In December, 1911, one Harry Gips was the owner of a certain piece of land situated on North Main street in Waterbury, upon which at that time stood a building. It appears that the land was a building lot 54 by 120 feet. On the 11th day of December, 1911, under an oral agreement made with Gips, the plaintiff began to furnish materials and render services in the construction of an addition to this building. This addition when finished formed a part of the building originally standing

upon this land. The addition consisted of several rooms, three stores, and a veranda. The plaintiff ceased furnishing materials and rendering services on the 12th day of June, 1912. On the 22d day of July, 1912, and within 60 days from the date of ceasing to furnish materials and rendering services, the plaintiff executed and filed a good and sufficient mechanic's lien upon these premises. This lien was duly recorded in the land records of Waterbury on the 22d day of July, 1912. On the 10th day of July, 1912, Gips conveyed these premises to the defendant by a deed recorded in the Waterbury land records. The plaintiff has never been paid for these materials and services thus furnished and rendered.

On May 21, 1912, Gips executed and delivered to the plaintiff his promissory note for \$1,284.43, which note was accepted by the plaintiff and credited upon its books as a credit, in the same manner as credits for materials returned and cash paid. This note was discounted at the plaintiff's bank. No fixed time was ever agreed upon between Gips and the plaintiff for the payment of materials furnished and services rendered. The note was not paid at maturity, and Gips did not offer to renew the same, and no payment has at any time been made thereof. It was not agreed or understood between the plaintiff and Gips that this note was to be accepted in payment of the debt evidenced thereby. At the time of the acceptance of the note nothing was said by Gips or the plaintiff as to the plaintiff's right of lien upon the premises, and the plaintiff at all times relied upon the security of this lien and right of lien for the payment of the debt evidenced by the note. At no time did the plaintiff agree or contract to waive its statutory lien or right of lien upon these premises. The defendant did not inquire of the plaintiff as to whether or not the plaintiff had ever been paid for his materials and services, or whether the note had ever been paid. At the time the defendant obtained title to the premises she knew that the plaintiff had furnished these materials and rendered the services in question, and she also knew that this note had been executed. * * *

By the express provisions of the statute, section 4135, the lien of the plaintiff "took precedence of any other incumbrances originating after the commencement of such services, or the furnishing of any such materials." This date was December 11, 1911. The defendant did not obtain her deed until the 10th

day of July, 1912, two days before the plaintiff ceased furnishing material and rendering services. The finding does not disclose a case for the application of the doctrine of estoppel. The plaintiff's lien attached to the property when it commenced to furnish materials and render services.

The defendant acquired title to the real estate when the plaintiff had substantially completed its work. The defendant knew that the plaintiff had been adding to the value of the real estate she was about to purchase by its labor and materials, and she was chargeable with notice that a lien might attach to this property for these improvements. Justice Story says: "Whatever is sufficient to put a party upon inquiry (that is, whatever has a reasonable certainty as to time, place, circumstances, and persons) is in equity held to be good notice to bind him." Story's Equity Jurisprudence, vol. 1, c. 7, p. 401.

The defendant made no inquiry of the plaintiff to ascertain whether it intended to claim a lien for its labor and materials. There was no false representation made by the plaintiff to any one; there was no intention on its part to deceive. The court has distinctly found that the plaintiff and the defendant at no time communicated upon the subject. The letters that the defendant read were merely communications passing between the plaintiff and a third party in reference to a business transaction, and did not purport to state facts upon which the defendant would be justified in relying. It does not appear that this property was sold to the defendant clear of the plaintiff's lien, and especially with its knowledge and acquiescence. On the contrary, it may be inferred from the finding that the plaintiff knew nothing of this transfer at the time or before it was made. Neither does it appear that the plaintiff performed any work or rendered any services after it had knowledge of this conveyance.

The defendant contends that the conduct of the plaintiff, as disclosed by the finding, constituted a waiver of its right of lien. It is urged that the plaintiff agreed upon a sufficient consideration to take the promissory note of Gips, without security, for his debt. This, it is said, formed a special contract which destroyed the plaintiff's right of lien. It appears from the finding that Gips executed and delivered to the plaintiff his note for \$1,284.43, substantially the amount of its

claim against Gips. This note was accepted and credited upon the books of the plaintiff as cash paid. This note was never paid. It was also found that it was not understood that this note was to be accepted in payment of the debt evidenced thereby, and that the plaintiff always intended to rely upon the security of this lien for the payment of this debt.

The question of waiver in this case is a question of intention to be determined by the trial court. The finding of the court is conclusive against the defendant upon this point. The plaintiff never expressly agreed to accept this note in discharge of its lien. The statute subjects this property to a lien for the payment of the plaintiff's debt. This debt has never been paid. The plaintiff's lien is therefore entitled to priority over the defendant's title. Hopkins v. Forrester, 39 Conn. 351, 354; Halsted & Harmount Co. v. Arick, 76 Conn. 382, 387, 56 A. 628.

There is no error. The other Judges concurred.

SECTION 3.—EFFECT OF BREACH BY OWNER ON CONTRACTOR'S WAIVER

KERTSCHER & CO. v. GREEN et al.

Court of Appeals of New York, 1912.
205 N.Y. 522, 99 N.E. 146, Ann.Cas.1913E, 561.

CULLEN, C. J. The action was brought to foreclose a mechanic's lien. * * * The plaintiff contracted to perform the carpenter's and cabinet work and materials in the building to be erected for the defendant. By the written contract it was provided: "That the party of the second part will not at any time suffer or permit any lien, attachment, or other incumbrance under any laws of this state or otherwise, by any person or persons whomsoever, to be put or remain on the building or premises, into or upon which any work is done or materials are furnished under this contract, for such work or materials, or by reason of any other claim or demand against the party of the second part, and that they will not put any materials on said

building to which it has not obtained absolute title; and that any such lien, attachment or other incumbrance, or claim of a third party until it is removed, shall preclude any and all claim or demand for any payment whatever under or by virtue of this contract, and in the event that same is not removed, party of the first part may remove same at the expense, including legal fees, of the party of the second part." Payments were to be made on or before the 10th day of each month of 80 per cent. of the value of the work done in the preceding month. It was further provided that the final payment should not be made until there was filed with the superintendent or architect a certificate of the county clerk that no mechanic's lien had been filed against the owner for work or materials furnished under the contract and the certificate of the register that no conditional bill of sale had been filed by a third party for any material furnished on said property. After the completion of the work on October 26, 1907, the plaintiff filed a mechanic's lien for the amount due him under the contract, to foreclose which this action was brought.

The contention of the appellants is that the lien was invalid because by the contract the plaintiff, the contractor, had agreed not to file any lien. To this contention there are two answers. The trial court found that the defendants had failed to make the payment for the September work which became due under the contract on October 10th. Assuming that the contract between the parties is to be construed as contended by the plaintiff, the breach of the contract by the defendants by their default in making that payment relieved the plaintiff from the obligation upon its part, and it became entitled to file a lien for its work and materials. This proposition has recently been held by this court in the case of *Greenfield v. Brody*, 204 N.Y. 659, 97 N.E. 1105, decided without opinion. In that case the contract was for the construction of several houses, and the contractors were to be paid in part by the conveyance to them of two of the houses. The owner transferred the property, thus putting it beyond his power to comply with the contract. It was held this authorized a contractor to file and maintain a lien. In that case the plaintiffs, contractors, had expressly agreed that under no circumstances would they file or cause to be filed any mechanic's lien against the property. * * *

PROPERTY

Chapter

1. Nature and Forms.
 2. Transfer of Title to Real Property.
 3. Rights Incident to Ownership of Land.
 4. Rights in Another's Land—Easements.
-

CHAPTER 1

NATURE AND FORMS

Section

1. In General.
 2. Estates in Real Property.
-

SECTION 1.—IN GENERAL

When the assertion is made that one has property, it may mean that he has title to certain real or personal property, or it may mean that he has some interest less in importance and duration than ownership.

The word "property" is used in two senses: First, the thing owned; and, second, an interest in real or personal property.

In general, land and the things attached thereto are real property. In general, movable property is personal property. But, as we shall see, there are important qualifications to these general rules.

Along another line, property is divided into corporeal and incorporeal property. Corporeal property is such property as has a physical body. Incorporeal property is such property as has no physical body. A cow, a tractor, a stock of goods, a ton of coal, or

a lot of land, is corporeal. A share of stock, a promissory note, or an easement, is incorporeal.

Definition of Property.—In the broadest sense, the term “property” includes everything tangible or intangible, corporeal or incorporeal, movable or immovable, which is capable of exclusive possession, and which carries with it the right of use, enjoyment, and disposal. In a legal sense, property means the sum total of rights of ownership incident to the object, rather than the object itself. The rights of ownership are those already referred to, namely, the rights of exclusive possession, use, enjoyment, and disposal.

Real Property and Personal Property.—Rights of ownership incident to land and all that is permanently attached thereto are called “real property.” Rights of ownership incident to chattels, or movables not attached to land, are called “personal property.” For the purpose of clarity, in referring to the object, we shall use the words “real estate” or “chattel,” according to whether it is land or movables; and for reference to the legal rights incident to the object, we shall reserve the word “property,” real or personal as the case may be.

Chattels.—The body of legal principles governing the transfer of title to chattels forms the law of sales. The moment at which title passes, and the effect of warranties, express or implied, of the chattel sold, are there provided. It will be sufficient at this point to state simply that the requirements of transfer of title to a chattel are much less formal than in the case of real estate.

SECTION 2.—ESTATES IN REAL PROPERTY

The various degrees of ownership or “estates” in real property are: Fee simple estates, estates for life, estates arising out of marriage, joint estates, estates for years, and easements.

In General.—Real property being the legal rights incident to land, it follows that the extent or number of these rights held by

a person in respect to a particular piece of land measures the extent of his property therein. This extent of property or interest is called an estate.

Fee Simple Estate.—An estate in fee simple is the highest estate known to the law; it includes all of the legal rights incident to the land. The owner of an estate in fee simple is as nearly as it is possible to be an absolute owner. He may dispose of it by deed during his lifetime, or by will to take effect at his death. He may carve out of it certain less estates, as, for example, where he grants to another an easement or an estate for life or for years.

Estates for Life.—An estate for life is one that is vested in a person called a "life tenant," to continue during his lifetime, or for the life of another, at the end of which period it reverts to the owner of the fee, who is called the "remainderman." The owner of the life estate may convey away his whole estate, or grant less estates than his own. He may not commit waste; that is, he may not do any act which results in permanent or lasting injury to the land. For instance, a life tenant may not open mines or oil wells and exhaust the land of its mineral content, although, if the mine or well is already open at the time he comes into his estate, he may continue to take out the mineral.

Estates Arising out of Marriage—Dower.—Dower is the estate in land provided for the widow by law out of the husband's real estate. At common law the widow has, during her life, one-third of the lands of which her husband was seized during marriage. Dower has in many states been changed by statute to give the surviving wife one-third of her husband's lands in fee, and to give the husband a corresponding interest in her lands.

Estates Arising out of Marriage—Homestead.—By statute in many states, a new estate called homestead has been created consisting of a certain value in the family residence, usually one thousand dollars, which among other things, is exempt from debt. The homestead estate may be lost by abandonment, or it may be conveyed by deed.

Joint Estates—Joint Tenancy and Tenancy in Common.—Where an estate is held by two persons jointly, each owns an undivided portion, and both are entitled to enjoy the land. Upon

the death of one joint tenant, his share vests in the survivor. In a tenancy in common there is no rule of survivorship, and each may dispose of his one-half share by deed or by will. Everywhere joint tenancies are held to be tenancies in common, unless the deed expressly states that the land is to be held in joint tenancy, and not in tenancy in common.

Easements.—Easements are real property, in that they consist of rights in land. The object of easements will be considered more fully under that head later on.

Estates for Years.—An estate for years is created by a contract called a "lease"; the one renting the land being called the "lessor" and the one to whom the land is rented being called the "lessee."

CHAPTER 2

TRANSFER OF TITLE TO REAL PROPERTY

Section

1. Transfer of Title by Deed.
 2. Transfer of Title by Operation of Law.
-

SECTION 1.—TRANSFER OF TITLE BY DEED

Title to land is transferred by delivery from grantor to grantee of a formal document called a deed. A deed must be in writing, signed, sealed, acknowledged, and delivered. There are two types of deeds: The warranty deed and the quitclaim deed.

In General.—Title is the means by which one acquires property in lands. The conveyance of title to real estate is a very technical procedure, all the details of which must be fully and exactly carried out; otherwise the conveyance will be inoperative to pass the title.

A deed may be defined as a writing, signed, sealed, delivered, and acknowledged, by which the title to land is transferred from one party, called the "grantor," to another, called the "grantee."

There are two forms of deed commonly used, the quitclaim deed, and the warranty deed. A quitclaim deed purports to pass whatever property in the land the grantor has and no more. He may have no interest at all, but, whatever he has, he grants. The quitclaim deed is in general use for the purpose of clearing up clouds on the title or doubtful claims against real estate. A warranty deed is a deed of bargain and sale, containing the personal warranty of the grantor that he has a clear title.

Requisites of a Valid Deed.—In order that a deed be operative to convey title to real estate, it must comply with the following requirements:

(1) It must be in writing and signed. Under the Statute of Frauds the conveyance of any interest in land is provable in court only by a writing.

(2) It must contain the names of the parties. If the grantor or grantee is not named in the deed with certainty, no title passes.

(3) It must contain a granting clause. This clause contains the operative words of grant. These are most frequently "give, grant, bargain, and sell." The granting clause contains words of inheritance. "To A and his heirs forever" conveys a fee to A. The use of the word "heirs" was essential to pass a fee simple estate, at common law; but by court decisions and the passage of statutes, the word "heirs" has been stripped of its common law significance and is now unnecessary to pass a fee simple estate. Thus, "To A and his heirs," would pass a fee simple estate both at common law and today. "To A" passes the same estate at the present time but was insufficient so to do at common law.

In order to pass a lesser estate, the estate to be conveyed must be defined. For example, "to A" passes a fee simple estate; "to A for life" passes a life estate.

(4) It must identify the land conveyed by descriptive words. If the description is so uncertain that it is impossible to ascertain what land was meant, the deed will be void for uncertainty.

(5) It must contain a relinquishment of dower and homestead. The dower right of the wife in her husband's land cannot be relinquished without the consent of the wife. She may, however, convey her dower right simply by executing the deed or mortgage concurrently with her husband.

The homestead estate in the land sought to be conveyed passes by the deed signed both by husband and wife; but in many states the acknowledgment must expressly mention conveyance of homestead.

(6) The deed must be acknowledged before a notary. The form of acknowledgment is usually prescribed by statute. It consists usually in the mere statement of the grantor that he acknowledges the conveyance to be his free act and deed. The officer then certifies over his seal and signature that the deed was acknowledged before him.

(7) The deed must be delivered to the grantee. Until the grantor voluntarily delivers the deed, no title passes, and not even a bona fide purchaser from the grantee gets any title. But, once the deed is delivered, title has passed; and mere destruction of the deed, or its delivery back to the grantor, will not make him the owner again. It is the act coupled with the intention which operates to transfer the title; it is not possession of the instrument.

SECTION 2.—TRANSFER OF TITLE BY OPERATION OF LAW

Title to land is transferred by operation of law, without voluntary assent by the owner, in the following cases: (1) In eminent domain proceedings; (2) by adverse possession; (3) in furtherance of incompetents' interests, i. e. infants, insane persons, etc.; (4) in proceedings by creditors; (5) devolution of land on death of the owner to his heirs.

1. EMINENT DOMAIN

Fee simple title is the largest possible interest a person can have in land, but even this is not absolute ownership. The rights of the public are paramount to those of the individual, and, where it is to the best interests of the public that land be taken for a public purpose, the fact that the land is already owned by an individual will not stand in the way. Upon proper application to the courts by an agency of the public in the proceeding known as eminent domain, upon payment to the owner of the value of his real estate, land may be taken from the individual owner, against his will and without his consent.

The public agencies having this power of eminent domain include the state, municipal corporations, railroads, public utilities, and most enterprises so far affected with a public interest as to be subject to state regulation.

2. ADVERSE POSSESSION

Title by adverse possession is that title which a person acquires who is in possession of the lands of another person for a certain length of time and under certain conditions. The time in most states is twenty years. The conditions are that the claimant must have had adverse, actual, and visible, exclusive, continuous possession of the land for the twenty-year period under a claim of title.

Statutes of Limitation.—Most of the states have passed statutes of limitation relating to land titles, providing that after a specified period, usually twenty years, of adverse or wrongful possession the true owner may no longer advance any claim to ownership. The theory of this legislation is the necessity of security in land titles and the prevention of the making of illegal claims to land after the evidence necessary to defeat them has been lost. The owner of land, who, knowing that another is in wrongful possession, fails to assert his right for the twenty-year period, may properly be penalized by being precluded thereafter from asserting his right.

Presumption of Lost Grant.—Independent of a statute of limitations, a similar result is achieved as to transfer of title in adverse possession by the conclusive presumption of a valid conveyance to the adverse claimant after his twenty-year occupancy. It is immaterial that there was in fact no such conveyance. From the fact of adverse and hostile use of the land for twenty years, the law presumes a lost grant, and confirms the title in the adverse claimant. It is to be noted that under the statute of limitations the transfer of title is by way of penalty to the real owner, while under the presumption of a lost grant there is involved an inference of the making of a conveyance from the fact of possession and adverse use.

3. OTHER MODES OF TRANSFER BY OPERATION OF LAW

Other cases in which an involuntary alienation or transfer of title takes place are:

- (1) Where the lands of infants, insane, or other incompetent persons are sold for their benefit or protection.

(2) Where lands are sold to satisfy the claims of creditors under the execution of a judgment against the owner, or are conveyed under a decree of a court of equity by way of foreclosure of a mortgage or other lien thereon.

(3) Where one in whom legal title to land is vested dies intestate—that is, without leaving a will—the law operates to transfer title to his heirs.

CHAPTER 3

RIGHTS INCIDENT TO OWNERSHIP OF LAND

Section

1. In General.
 2. Support.
 3. Rights in Streams and Watercourses.
 4. Air.
-

SECTION 1.—IN GENERAL

Importance of the Subject to the Engineer.—The first essential of any engineering or architectural project is the acquisition of the land for a site or right of way. It is of prime importance to the enterprise that the land selected for a site be free, not only from physical defects, such as may undermine and destroy the structure, but also free from defects in title, such as exist when rights of others are involved. Such latter considerations should be the concern of the engineer or architect, quite as much as the owner. The professional employee, with a knowledge of such questions, who performs his duties with reference thereto, will be valuable to his employer. Practically all operations in engineering and architectural construction have for their object utilization of rights in land. The precise nature of such rights is involved in the cases following. Our inquiry will include an examination into the rights of ownership of land and rights in the land of another.

Land.—In its legal sense, “land” includes the ground or soil of the earth, together with all things attached thereto, and is deemed to extend indefinitely upward and downward, *ad coelum et ad infernos*, from the sky to the center of the earth. It includes all structures upon the land, and all minerals, oils, and gases beneath the surface.

Trespass.—The owner of land has legal rights in respect thereto against all others. The sum total of these rights is free and exclusive use and enjoyment. Interference therewith is trespass. Thus, where a person, without permission, enters upon the land of another, or tunnels under his land, or strings wires over his land, or builds a house with an eave projecting into the air over his land, any one of these acts is a breach of the duty owed by all other persons to the owner in respect to his land, for which the law will grant a remedy in damages, or which equity will restrain by injunction.

Other Incidents of Ownership.—Use and enjoyment of land includes many rights, both as to matters beneath and above the surface. The matter of vertical and lateral support is an essential right. The question of rights in running waters and streams often becomes involved. The rights of an owner of land in the air above his estate is an important question. In the sections following we shall examine some of the decisions of the courts of last resort which define the limits of these rights. In general it may be said that an owner's rights to use and enjoyment of his land are limited only by the conflicting rights of use and enjoyment of other owners.

SECTION 2.—SUPPORT

Every owner has the right to have his land supported by the land of his adjoining neighbor. An excavation resulting in the caving in or settling of the adjoining land is a breach of the right to have land supported in its natural state and gives rise to an action for damages. If it is the weight of a building on the adjoining property which causes the land on that property to cave in then the owner of the land upon which the excavation had been made is not liable for the loss of support. But if the cave-in would have resulted from the excavation even if no building was on the land, an action for damages to the land will lie. The modern trend in the United States is that the damages to the building as well as the land can be recovered in such a case.

FOLEY v. WYETH.

Supreme Judicial Court of Massachusetts, 1861. 2 Allen, 131, 79 Am.Dec. 771.

[This was an action for damages for breach of duty of lateral support. Plaintiff owned a piece of land adjacent to land owned by the defendant, and it appeared that the defendant in making an excavation on her own land caused a considerable portion of the land of the plaintiff to cave in and to be removed.] Proof of the alleged excavation and injury to his land * * * having been adduced by the plaintiff, the presiding judge ruled that this was sufficient to entitle him to maintain his action, and that for this purpose it was not incumbent on him to show also that the excavation was made by the defendant in a careless, negligent, and unskilful manner.

MERRICK, J. * * * [The ruling of the trial judge was correct.] If the owner of land makes an excavation in it so near to the adjoining land of another proprietor that the soil of the latter breaks away and falls into the pit, he is responsible for all the damage thereby occasioned. Few principles of the law can be traced to an earlier or to a more constant recognition, through a long series of uniform and consistent decisions, than this. * * * "The right to support from the adjoining soil may be claimed * * * in respect of the land in its natural state. * * * The right is not an easement, but is a right of property as being necessarily and naturally attached to the soil. * * * It is a necessary consequence from this principle that, for any injury to his soil resulting from the removal of the natural support to which it is entitled, by means of excavation on an adjoining tract, the owner has a legal remedy in an action at law against the party by whom the work has been done and the mischief thereby occasioned. This does not depend upon negligence or unskilfulness, but upon the violation of a right of property which has been invaded and disturbed. This unqualified rule is limited to injuries caused to the land itself, and does not afford relief for damages by the same means to artificial structures. For an injury to buildings, which is unavoidably incident to the depression or slide of the soil on which they stand, caused by the excavation of a pit on adjoining land, an action can only be maintained when a want of due care or skill, or positive negligence, has contributed to produce it.

The jury were therefore correctly advised that, if the defendant, by excavations in her own land, and by carrying away large quantities of earth and clay therefrom, caused the adjoining land to fall and sink into the pit which she had dug, she was liable for the injury done to the soil of the plaintiff, and that this action might be maintained to recover damages for the interruption and disturbance of his right of way in the passageways, as well as for depriving him, or lessening the value, of the use of the land to which they were appurtenant. But it was erroneous, in the absence of any proof of carelessness, negligence or unskilfulness in the execution of the work, to add that they might take into consideration as an element of damage for which compensation could be recovered, the fact that the foundation of his house had been made to crack and settle. * * *

[Judgment for plaintiff.]

GILDERSLEEVE v. HAMMOND et al.

Supreme Court of Michigan, 1896. 109 Mich. 431, 67 N.W. 519, 33 L.R.A. 46.

Plaintiff and defendants were the owners of adjoining lots in Battle Creek, situated in the business part of the city. Plaintiff had, several years ago, erected a building upon her lot, the lower part of which was occupied as a store by a tenant, and the upper portion by other tenants. Plaintiff had no cellar underneath her building, and it stood upon a stone wall sunk into the earth to a depth of from 20 to 24 inches, and from 12 to 18 inches above the surface, and built sufficiently strong to support the structure above it, which was a balloon frame veneered with brick. It had stood there in safety for several years. It was built 4½ feet from the division line between their lots. Defendants' lot was at that time vacant. In 1893 the defendants, desiring to erect a building upon their lot, with a cellar underneath, proceeded to excavate for that purpose to the depth of between 7 and 8 feet, close to the line. The soil was sandy and gravelly, with little adhesive power, and, as the excavation went down, plaintiff's soil caved into the excavation. Defendants took no steps to prevent the soil from caving in, or to protect plaintiff's building. They excavated the whole length of the building, permitting the soil to cave in, ac-

cording to its natural tendency. It had fallen away from underneath the foundation wall. In consequence of this the foundation under plaintiff's building was undermined, and a portion of the side of the building fell out, causing considerable damage. The defendants were cognizant of the danger. So, also, was the plaintiff, whose evidence supported the claim that defendants promised to protect her building. This is an action upon the case, to recover damages for injury. * * *

GRANT, J. (after stating the facts). The precise questions involved appear not to have been decided by this court. The questions are: (1) What rights does a landowner possess, in excavating close to his neighbor's line? (2) What duty does he owe to his neighbor, and what means, if any, must he take to protect the soil of his neighbor and prevent it from caving in? (3) Under what circumstances, if any, is such landowner responsible for damages to the superstructure erected on his neighbor's lot?

The defendants' positions are thus summarized: (1) Plaintiff's building was in a business part of the city. She was therefore bound to know that improvements would be made upon the adjoining vacant lot, and was bound, in law, to so construct her building as to allow such improvements to be made in the ordinary way. (2) They admit that plaintiff was entitled to the natural right of lateral support for her land from the adjoining land, and, if her land fell in consequence of such excavation, she had an action against the defendants, although the excavating was not done carelessly or unskillfully. (3) This natural right does not extend to the artificial structures placed upon the land, and, if the plaintiff erected her house on or near the verge of her land, she had no natural right of lateral support for the building.

Plaintiff bases her claim upon the familiar legal maxim, "Sic utere tuo ut alienum non laedas," insisting that this maxim applies to the case where one may, by the exercise of ordinary care and prudence, so use his own as not to cause injury to another. The court instructed the jury as follows: "The adjacent owner may excavate his own land for such lawful purposes as he sees fit, provided he digs with ordinary care; and if in so doing the earth gives way, and a house upon the adjacent land falls by reason of the additional weight placed upon the natural soil, he is

without remedy, provided the adjacent owner used ordinary skill, care, and diligence in digging the excavation, and has used reasonable means to protect the adjacent lands and buildings from falling into the excavation." This was the groundwork of the charge, and we need not state it more fully.

The defendants' first proposition is undoubtedly a correct statement of the law. Chancellor Walworth, in *Lasala v. Holbrook*, 4 Paige, 169, thus states the rule: "I cannot deprive him [my neighbor] of this right by erecting a building on my lot, the weight of which will cause my land to fall into his pit, which he may dig in the proper and legitimate exercise of his previous right to improve his own lot." Non sequitur that the excavator may dig his pit so close to his neighbor's line that his adjacent land will fall into it, and, as it falls, draw it away, and continue this process until several feet in width have caved off, and undermined a building several feet from the line. Clearly it was not, in this case, the pressure of the building upon the adjacent land that caused the soil to cave. The soil would have caved in, had there been no building. The caving process began almost simultaneously with the digging. Had the soil been sufficiently adhesive to leave a perpendicular surface as the excavation was made, the building would not have caused it to fall. At least, there is no evidence that it would. Therefore the pressure of the soil did not cause the soil to cave in, but the removal of the plaintiff's soil, between the division line and his foundation wall, caused the building to fall. The distinction between the two cases, and the principles governing them, is apparent.

The defendants' second position is conceded to be the law. It is also the well-established rule that a superstructure is not entitled to the lateral support of the adjoining land, and that a land-owner may remove such support for all legitimate purposes.

* * * In order to maintain an action for injury to the adjoining land in consequence of an excavation made by the adjacent owner, no negligence is necessary. Every man is entitled to the enjoyment of his land in its natural state, and any removal of it by excavating the adjoining land is a wrong, *per se*, for which the law gives damages. It would seem to follow naturally that in such excavations the landowner is bound to the exercise of some degree of care to prevent the soil from caving in. If the soil is adhesive, so that it will remain in its natural position with the

lateral support removed, obviously the excavator may excavate as deep as he pleases—even close to the boundary line. If in such case his neighbor's land caves in by reason of the pressure of the superstructure upon it, it is *damnum absque injuria*. But is this true of a sandy, gravelly soil? Most of the authorities above cited recognize the duty of the excavator to use reasonable care in the performance of his work.

Washburn says, at the page above cited, "such adjacent owner may excavate his own land for such purposes as he sees fit, provided he does not dig carelessly or negligently." * * * So, in Washb. Easm., at page 582, the editor thus states the principle: "If the owner of the adjoining land takes away the natural support, it does not matter whether he acts with due care and is guilty of no negligence. On the other hand, this natural right of support does not extend to buildings or other additional weights superimposed upon the land, unless, either by express grant or by their existence on the land for a prescriptive period, they have gained an easement of support from the adjacent land. Until they have so acquired that right, the owner of the adjoining land may cut or dig it away as he chooses, provided he does not carelessly or wantonly deprive his neighbor of the support to his buildings; or, in other words, if the owner of the adjoining land makes an excavation of such a nature that by it the adjoining land would, in its natural state, be caused to fall, without the additional weight of buildings upon it, he is liable, whether negligent or not. If the excavation is such that the adjoining soil would not have fallen, had it not been weighted by the buildings upon it, he is not liable, unless he made the excavation carelessly, negligently, or wantonly."

Undoubtedly the courts often find difficulty in determining whether the superstructure did or did not cause the soil to cave in, but in this case we think there is no such difficulty. Plaintiff had erected a lawful building. She had placed the foundation wall $4\frac{1}{2}$ feet from the line. It is established by the evidence, and is also a matter of common knowledge, that the caving of the soil might have been avoided by either excavating and building the wall in sections, or by planking to keep the soil in place, as is usually done in excavating to put in sewers and water pipes in similar soil. * * *

Broadly and fairly stated, the defendants' contention is this: They had the right to excavate to the depth of 7 or 8 feet in this sandy and gravelly soil, the entire 52 feet, without any effort to prevent the plaintiff's soil from caving in, to draw it away as it fell until it had fallen to a distance of from 4½ to 5 feet from the boundary line and reached directly under her foundation wall, and that this was an excavation in the usual manner, and with ordinary care. The proposition does not commend itself to our judgment, nor does it seem to us to be based upon sound reason, common sense, and common honesty, which are the foundation of the common law. Nor do we think that the authorities sustain the proposition. On the contrary, we think that such conduct is negligence per se, bordering upon recklessness. It is established by the evidence that the caving of the soil could have been prevented by the defendants at an expense of from \$15 to \$25. In *Larson v. Railway Co.*, 110 Mo. 234, 19 S.W. 416, 16 L.R.A. 330, 33 Am.St.Rep. 439, the excavator had notified his neighbor that he should excavate and build his wall in sections. Instead of doing this, he excavated nearly the entire distance in a soil similar to that of the plaintiff, and was held responsible for injury to the building.

Our conclusion as to the law of this and similar cases is: (1) While a landowner has the undoubted right to excavate close to the boundary line, he must take reasonable precautions to prevent his neighbor's soil from falling. (2) If he has taken such reasonable precautions, and yet the soil falls from its own pressure, he is still liable for injury to the land, but not for any injury to the superstructure. (3) If the pressure of the superstructure causes the land to fall, he is not liable either for injury to the land or superstructure. (4) If he fails to take such reasonable precautions to protect his neighbor's soil, and to preserve it in its natural state, he is liable for the injury to both the land and the superstructure, if the pressure of the superstructure did not cause the land to fall, and it fell in consequence of the failure to take such reasonable precautions.

It is, however, insisted by the defendants that the plaintiff was guilty of contributory negligence, in not shoring up and protecting her own property when she saw the imminent danger. Under her evidence, the defendants informed her that they would pro-

tect her building, and this would relieve her from any further responsibility. * * *

Judgment for plaintiff.¹

SECTION 3.—RIGHTS IN STREAMS AND WATERCOURSES

Owners of land bordering on streams and watercourse have a property right in said streams to the extent of a reasonable use of the waters. But this use must not impair the right to a similar use by other riparian owners. In domestic use the water can be used to the extinction of the stream if there is no waste. Lower riparian owners have the right to have the stream flow past them in an unadulterated condition.

WOODIN v. WENTWORTH et al.

Supreme Court of Michigan, 1885. 57 Mich. 278, 23 N.W. 813.

SHERWOOD, J. It appears from the record in this case, that, during the year 1882, the plaintiff was in possession of, and used, and had for many years previous thereto, two mills in the township of Sherman, in Isabella county. These mills were run by water power upon Chippewa river. One was a gristmill and the other a sawmill, and stood side by side, and were joined together, and located about nine miles below the junction of the north and south branches of the Chippewa, which constitute the main stream. The defendants at the same time possessed and controlled a dam known as the "Hudson Dam," and banking ground for logs below the dam, where they were deposited in large quantities by defendants; and this dam was used by them for the purpose of flooding the logs away from the banking ground, and running them to the jam below. The dam was 16 miles, by the current of the stream, above the mills of the plaintiff, and located

¹ The dissenting opinion of Hooker, J., is omitted.

on the south branch. The plaintiff brought this suit against defendants for unlawfully holding back and diverting the waters of the river in the south branch, thereby preventing him from using his mills. The plaintiff in his declaration particularly sets out the wrong complained of, and alleges that he was thereby deprived of the use of his mills and the profits thereof which he would have made if the waters of the Chippewa had not been diverted.

* The defendants pleaded the general issue. The case was tried before a jury, and upon the trial the plaintiff introduced testimony tending to show that after the middle of June of each year logs could not be driven on the south branch of the Chippewa river without the use of floods, and that the defendants drove the logs so deposited by them on the banking ground above referred to by the use of floods from the Hudson dam, and that the waters of the south branch were held back by means of the dam, and that floods were let off from the dam at intervals during the season of 1882, commencing in the latter part of June and lasting up to the first of December; that by this use of the water the water was retained from the mills of plaintiff and let off in such a way that the plaintiff was deprived of the use of his mills during the season from the latter part of June to the first of December; that during this time the plaintiff was so deprived of the use of the sawmill entirely, and of the full use of the gristmill a portion of the time, and that the irregular manner in which the defendants let off the water was the cause of the failure of the mill to be operated during those times. * * *

For the purposes of this suit we must regard the testimony offered sufficient *prima facie* evidence that each party was the owner of the premises he occupied and used upon the stream. The record shows these parties proprietors on the same stream, and as such each has a right to a fair and reasonable participation in the use of its waters. This right the law will always protect, and, when violated, will furnish the proper means of redress. This right is common to all proprietors, and an injury to one, which is incident to the reasonable enjoyment of the common right by another, is not actionable. It is only the unreasonable use, detention, or diversion of the water that is actionable.
* * *

Upon the first question above stated the circuit judge held and charged the jury: "The plaintiff had the right to have the water of the south branch of the Chippewa river flow into and through his pond in its usual and ordinary mode of flowing, and any detention of the water by defendants, for the sole purpose of securing a flood, in such a manner that it could not be used by plaintiff in the running of his mills, was unreasonable and unlawful as to plaintiff, and entitles him to compensation for the resulting damages. If you find from the evidence that by reason of defendants' holding back the water by means of the dam, that plaintiff was thereby prevented from obtaining a sufficient supply with which to operate his mills, he is entitled to recover such damages as he has suffered by reason of being deprived of the use of his mills." We think these charges are not subject to the exceptions taken, but that the rule laid down is within the former decisions made by this court, and particularly the last case above cited, which is very much like the present in its facts. We find no occasion for modifying the views therein presented in any respect.

Upon the second question, the circuit judge charged the jury: "The measure of damages is such sum as the use of the mills was worth to the plaintiff during the time in the summer and fall of 1882 as plaintiff was unable to use them by reason of the water being held back. If the jury find for plaintiff they will award him such sum or damages as they find from the evidence that the use of the sawmill was worth to plaintiff between July 1, 1882, and December 12, 1882, if you find from the evidence that he was unable to run or use his sawmill between those dates solely on account of defendants' holding the water back; and also such sum as they may find from the evidence that plaintiff has lost by reason of not being able to run the gristmill to its full capacity between those dates, by reason of defendants' holding the water back." The law upon the subject of damages thus stated was applicable to the facts as claimed by the plaintiff, and entirely proper upon the theory of the case.

[The judgment for the plaintiff upon the verdict must be affirmed.]

GARWOOD v. NEW YORK CENT. & H. R. R. CO.

Court of Appeals of New York, 1881. 83 N.Y. 400, 38 Am.Rep. 452.

Action by the owner of a gristmill, operated by the waters of Tonawanda creek, in Batavia, Genesee county, to restrain the defendant from diverting the water above the plaintiff's mill, to tanks and reservoirs constructed by the defendant to supply its locomotive engines with water, and to recover damage for such diversion. * * *

DANFORTH, J. * * * The law is well settled that each riparian owner has a right to the ordinary use of water flowing past his land, that is, *ad lavandum et ad potandum*, for domestic purposes and his cattle, although some portion may be thereby exhausted; and this is so, without regard to the effect which such use may have upon the lower owner. The water may also be used for irrigation or for manufacturing purposes. The cases cited by the appellant are abundant to show this, but in every one the irrigation is of the land to which the right to use the water is an incident, or with which the manufacturing purpose is connected, but even this privilege cannot be exercised if thereby the lawful use of the water by a lower proprietor is interfered with to his injury. Miner v. Gilmour, 12 Moore 156; Tyler v. Wilkinson, 4 Mason 397, Fed.Cas.No.14312. Now, in the case before us the defendant has done something more; it has not been content with exercising this privilege; it has diverted a considerable portion of the stream not for any use upon the land past which it flows, but for the transaction of its business in other places and for purposes in no respect pertaining to the land itself. The pipes and reservoirs of the defendant are not laid or constructed for the mere purpose of detaining the water a short time, or applying it to machinery or other object upon the land itself, and afterward restoring it, but for facility in filling the defendant's locomotives, in order that they, with power generated from it, may pass as the interest of the defendant may require, to the east or west, returning no portion of it, even in the form of vapor, to the stream from which it was taken. So far as the plaintiff is concerned, it has carried away from his premises the water as effectually as if it had been turned into another channel and discharged at Albany or Buffalo; and from this, as the jury has found, he has sustained damage.

[The case, therefore, presents no exception to the rule that a riparian proprietor has no right to divert any part of the water of the stream into a course different from that in which it has been accustomed to flow, for any purpose, to the prejudice of any other riparian owner. The injunction should be made permanent.]

SECTION 4.—AIR

A person owning real property is entitled to all rights in the air above his land. This right extends to the heavens, and any interference with the air space is at least technically a trespass. Airplanes passing over land are trespassers, but because of public policy a cause of action is denied where the aviator passes at a sufficient height.

Unreasonable interference with air space may constitute a nuisance which may be abated by injunctive remedy in equity.

MADISON et al. v. DUCKTOWN SULPHUR, COPPER & IRON CO., Limited.

McGHEE et al. v. TENNESSEE COPPER CO. et al.

FARNER v. TENNESSEE COPPER CO.

Supreme Court of Tennessee, 1904. 113 Tenn. 331, 83 S.W. 658.

[This was a bill for injunction, filed by complainants, who are the owners of small farms situated in the mountains around Ducktown, against the defendant, a large copper smelter. The bill is based on the ground of nuisance, in that the defendant, in the course of reducing copper ore causes large volumes of smoke to issue from their roast piles, which smoke descends upon the surrounding lands, and injures trees and crops, and renders the homes of the complainants less comfortable and their lands less profitable than before. It appeared from the evidence that the complainants have occupied their present homes for more than

twenty years, and that the nuisance now complained of has been continuing for the past ten years, during which time the defendant copper company has made huge investment in plant and property, all of which will be lost to them should this injunction issue.]

NEIL, J. The general effect produced by the smoke upon the possessions and families of the complainants is as follows, viz.:

Their timber and crop interests have been badly injured, and they have been annoyed and discommoded by the smoke so that the complainants are prevented from using and enjoying their farms and homes as they did prior to the inauguration of these enterprises. The smoke makes it impossible for the owners of farms within the area of the smoke zone to subsist their families thereon with the degree of comfort they enjoyed before. They cannot raise and harvest their customary crops, and their timber is largely destroyed. * * *

It is found, in substance, that, if the injunctive relief sought be granted, the defendants will be compelled to stop operations, and their property will become practically worthless, the immense business conducted by them will cease, and they will be compelled to withdraw from the state. It is a necessary deduction from the foregoing that a great and increasing industry in the state will be destroyed, and all of the valuable copper properties of the state become worthless. * * *

While there can be no doubt that the facts stated make out a case of nuisance, for which the complainants in actions at law would be entitled to recover damages (*Swain v. Ducktown Sulphur, Copper & Iron Co.* [*Tennessee Copper Co.*] *supra* [111 Tenn. 430, 78 S.W. 93]) yet the remedy in equity is not a matter of course (*Parker v. Winnipiseogee, etc., Lake Co.*, 2 Black, U.S., 545, 17 L.Ed. 333). * * *

And the equitable remedy by injunction must be applied for with reasonable promptness. There must be no laches. * * * In *Graham v. Burkenhead, etc., Ry. Co.*, 48 Eng.Ch.Rep. 114, a delay of eighteen months was held sufficient, there having been expenditures made by the defendant in the meantime. In *Birmingham Canal Co. v. Lloyd*, 18 Ves. 515, a delay of two years was held sufficient, there having been an expenditure of £10,000 by the defendant in that time. * * *

Upon laches appearing, a court of equity will be justified in withholding relief and leaving the party to his rights at law. "A party may by laches," says Wood, "deprive himself of an equitable remedy against a nuisance. Thus if a party sleeps on his rights and allows a nuisance to go on without remonstrance, or rather without taking measures either by suit at law or in equity to protect his rights, and allows the party to go on making large expenditures about the business which constitutes the nuisance, he will be regarded as guilty of such laches as to deprive him of equitable relief, particularly until the right is first settled at law. And when the delay is also coupled with an acquiescence he will be deprived of all equitable relief, and may be placed in a position where the court will enjoin him from proceeding against the nuisance at law, or even to prevent the recovery of a judgment obtained therefor in a court of law." Wood, *Nuis.* § 804. * * *

We are of opinion that the complainants are estopped to claim equitable relief against the defendant * * * by their laches. It is clear * * * that these complainants had been suffering the injuries now complained of for ten years when the bill was filed, without making any complaint of them in any forum. In the meantime the defendant had expended several hundred thousand dollars in making improvements in the plant, and the nature and source of the injury were such that the complainants could not be mistaken as to the cause or extent of it. Under such circumstances, we are of the opinion that it would be inequitable to grant the severe remedy of injunction, but that the said complainants should be left to their actions for damages. * * *

A judgment for damages in this class of cases is a matter of absolute right, where injury is shown. A decree for an injunction is a matter of sound legal discretion, to be granted or withheld as that discretion shall dictate, after a full and careful consideration of every element appertaining to the injury. * * * Shall the complainants be granted, in the way of damages, the full measure of relief to which their injuries entitle them, or shall we go further, and grant their request to blot out two great mining and manufacturing enterprises, destroy half of the taxable values of a county, and drive more than 10,000 people from their homes? We think there can be no doubt as to what the true answer to this question should be.

In order to protect by injunction several small tracts of land, aggregating in value less than \$1,000, we are asked to destroy other property worth nearly \$2,000,000 and wreck two great mining and manufacturing enterprises that are engaged in work of very great importance, not only to their owners, but to the state, and to the whole country as well, to depopulate a large town, and deprive thousands of working people of their homes and livelihood, and scatter them broadcast. The result would be practically a confiscation of the property of the defendants for the benefit of the complainants—an appropriation without compensation. The defendants cannot reduce their ores in a manner different from that they are now employing, and there is no more remote place to which they can remove. The decree asked for would deprive them of all of their rights. * * *

We see no escape from the conclusion in the present case that the only proper decree is to allow the complainants a reference for the ascertainment of damages, and that the injunction must be denied to them. * * *

CHAPTER 4

RIGHTS IN ANOTHER'S LAND—EASEMENTS

Section

1. General Principles of Easements.
 2. Creation of Easements.
 3. Easements in Structures.
 4. Easements of Way.
 5. Easements in Artificial Watercourses.
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SECTION 1.—GENERAL PRINCIPLES OF EASEMENTS

An easement is a right which one proprietor of land has to a benefit or beneficial use in the land of another. Rights and interests acquired in another's land include rights of way, rights to water, support, air, light, view, and many similar interests appurtenant to the enjoyment of land. An easement does not involve an active duty upon the owner of the land subject to the easement, his duty being merely the passive one of not interfering with the class of acts within the rights of the holder of the easement.

Relation to the Engineering Profession.—The subject of easements is of vital importance to the public utility, to the railroad, to the business of electric power transmission, to the builder, to the architect, and to the engineer. The construction and operation of every project involves the acquisition of land and the assumption of the burdens incident thereto. "Injuries and resulting damages are a certain consequence of every engineering work, and a successful engineer must know what constitutes actionable injuries, and must, if possible, avoid them. The direct injuries to abutting property are usually apparent to a cautious and observing engineer, and may be guarded against; but there are other injuries none the less troublesome and frequently more fatal to the rapid progress and completion of works. They are injuries to incorporeal rights, invisible, unrecorded, unobserved,

that suddenly issue from obscurity in the shape of an exorbitant and extortionate demand, or of a threatened injunction on account of some unthought-of injury. A knowledge of these rights and prevention of their infringement would reasonably be expected of the engineer or architect more than from an attorney, who frequently ends his labors with an exhausting search of paper titles in the registry office. The engineer's or architect's experience enables him to anticipate future complications which must result from installation and operation of works, and to secure to the project privileges and rights, the lack of which may be the subject of expensive litigation.”¹

Easements Distinguished from Other Rights.—Natural rights, such as the right of an owner of land to the natural flow and reasonable or proportional use of water, air, and support, such as were dealt with in the preceding chapter, are not, as are easements, primarily rights in another's land, but are corporeal rights incident to the ownership of one's own land.

An easement is to be distinguished from a *profit à prendre*, which involves a power in one person to sever and remove from another's land something existing in or growing on the soil.

An easement is to be distinguished from a mere license, or terminable privilege, the chief characteristic of which is its revocability. The existence of an easement cannot be terminated without the consent of the holder, any more than can any other right.

Easements Appurtenant and in Gross.—An easement ordinarily exists for the benefit of the owner of some particular piece of land, as an incident to the more complete enjoyment of his land. It pertains to the land, not to the person. Thus the owner's right over the servient tenement, or the land of the other, is not personal to him, but is an incident of his ownership of his own land, termed the “dominant tenement.” Thus there can be no easement without a distinct dominant tenement. The right or easement runs with the land to which it is appurtenant, and it passes by a deed of conveyance to the grantee.

¹ Waite, Law of Operations Preliminary to Construction, p. 460.

An easement in gross, on the other hand, is a right personal to the holder, quite apart from his ownership of particular land. There is no dominant tenement to which the right is appurtenant. In such case the burden rests on one piece of land in favor of a person or individual; the principal distinction between an easement proper—that is, an easement appurtenant—and a right in gross being found in the fact that in the first there is, and in the second there is not, a dominant tenement.

1. IS AN EASEMENT IN GROSS ASSIGNABLE?

An easement in gross is not assignable nor inheritable. It is not assignable because it is a personal right meant to be given to a particular individual and to no other. It is not inheritable because it is personal and too many difficulties present themselves if the right is attempted to be distributed among heirs or assignees.

BOATMAN et ux. v. LASLEY.

Supreme Court of Ohio, 1873. 23 Ohio St. 614.

[This was an action for the purchase price of real estate sold by plaintiff, Lasley, to the defendant. The defendant pleads a set-off or counterclaim against the plaintiff, alleging damages for a breach of plaintiff's warranty against incumbrances. The alleged incumbrance consisted of a private right of way over the warranted premises in one Alexander Logue, a right outstanding at the date of the conveyance. This right of way had been granted by deed, to "Logue, his heirs and assigns, and the tenants or occupiers for the time being of the lands owned and occupied by the said Alexander Logue, in section 15, town 5, in the Ohio Company's Purchase."]

[Plaintiff denies the existence of any easement as an incumbrance, on the ground that before the date of plaintiff's sale and covenant to defendant said Logue had conveyed all of his said lands in section 15 to one George W. Roush. Further, defendant fails to make any allegation that Logue, at the time the right of way over the warranted premises was granted to him by the plaintiff, was the owner or occupier of any land in said section

15, or elsewhere, nor is it alleged that the right of way complained of became appurtenant to any land whatever, or that said Roush had any interest in said right of way. Plaintiff therefore argues, that since Logue owned no land to which the easement of way was appurtenant, it was an easement in gross personal in Logue, not assignable to Logue's grantee, and therefore no incumbrance on the land granted by plaintiff to defendant.]

MCILVAINE, J. Is a private right of way over the lands of another, in gross, such an interest or estate in land, as may be cast by descent, or may be assigned by the grantee to one who has no interest in the land? These are the only questions in this case. If such a right be inheritable or assignable, defendant's right to damages for breach of covenant against incumbrances is clear.

Defendant strongly insists, in argument, that a right of way in gross may be conveyed to the grantee "and to his heirs and assigns forever," because an owner in fee may carve out of his estate any interest less than the whole and dispose of the less estate absolutely; and this because the power to dispose of the whole estate includes a power to dispose of any part of it.

This argument assumes the affirmative of the very question in controversy, to wit, that such a right of way is an interest or estate in the land.

A mere naked right to pass and repass over the land of another, a use which excludes all participation in the profits of the land, is not, in any proper sense, an interest or estate in the land itself. Such a right is in its nature personal; it attaches itself to the person of him to whom it is granted, and must die with the person.

If such right be an inheritable estate, how will the heirs take? In severalty, in joint tenancy, coparcenary, or as tenants in common? If not in severalty, how can their interests be severed?

If it be assignable, what limit can be placed on the power of alienation? To whom and to how many may it be transferred? Why not to the public at large, and thus convert into a public way that which was intended to be a private and exclusive way only?

Where the way is appendant or appurtenant to other lands, very different considerations arise. There the right attaches to the lands to which the way is appurtenant, because it is granted for the convenience of their occupation without respect to the ownership or number of occupants. In such case the right of

way passes with the dominant estate as an incident thereto. A right of way appendant cannot be converted into a way in gross, nor can a way in gross be turned into a way appendant.

A very marked distinction also exists between a way in gross and an easement of profit à prendre, such as the right to enter upon the lands of another, and remove gravel or other materials therefrom. The latter so far partakes of the nature of an estate in the land itself, as to be treated as an inheritable and assignable interest. *Post v. Pearsall*, 22 Wend., N.Y., 432.

Both upon principle and authority, we think there was no error in the charge of the court below. Mr. Washburn in his work on Easements, p. 8, par. 11, states the law upon this subject as follows: "A man may have a way in gross over another's land, but it must, from its nature, be a personal right, not assignable or inheritable; nor can it be made so by any terms in the grant, any more than a collateral and independent contract can be made to run with the land." * * *

[Judgment for plaintiff.]

STANDARD OIL CO. v. BUCHI et ux.

Court of Chancery of New Jersey, 1907. 72 N.J.Eq. 492, 66 A. 427.

[Bill for injunction to restrain defendant from forcibly interfering with the complainant's work in laying across the lands of defendant a line of pipe for the transportation of oil. It appears that one James H. Kingsland secured from the defendant by deed a right of way across defendant's land for the laying of a pipe line, and that said Kingsland conveyed his rights in this right of way to the Standard Oil Company, plaintiff herein. That deed, or so much of it as is necessary for present purposes, is as follows: "Witnesseth: That for and in consideration of five dollars in hand paid, the receipt of which is hereby acknowledged and the further sum of twenty dollars to be paid before any pipe is laid, the party of the first part, his heirs and assigns, hereby grants to the party of the second part, his heirs and assigns, the right of way to lay pipes for the transportation of petroleum, and operate the same on, over and through his lands in said county of Bergen, in said state of New Jersey."]

PITNEY, Advisory Master. * * * [The justification set up by the defendant for his interference with the work is as follows:] That the grant contained in the Kingsland deed amounted to no more than the grant of an easement without the naming of any dominant tenement, and therefor amounted to no more than an easement in gross, which was not assignable, and hence amounted to a mere license, and was determinable at the will of the licensor; that the license was in law immediately abandoned by the assignment thereof, and that it was also formally determined by a notice of revocation given by the defendant Buchi to the complainant, dated March 5, 1907, and annexed to the bill of complaint. * * *

The idea underlying the ordinary easement is that it is at the expense of one tenement, called the "servient" tenement, and for the benefit especially of another tenement, called the "dominant" tenement. Clearly the right granted by the deed in this case was not of that character, and hence it must be construed by rules not applicable to those of ordinary easements. There was in this case, and could in the nature of things be, no dominant tenement. Nor is it, in its essential nature a license, nor can it be reduced in its nature in that respect. It by its terms granted a permanent right to lay the pipe, to maintain the same, and to remove the same. It gave an interest in the land quite as positive and as permanent as that in which a deed is given granting the right to lay a line of water pipes or to erect a line of telephone poles across the grantor's land, where the circumstances indicate that the work done thereunder was to be permanent. From these considerations, based on general and familiar principles, I come to the conclusion that the defendant's position is untenable, especially when urged in a court of equity. * * *

I think the present grant is something more than an easement, although undoubtedly it includes easements, and I think that it is a great deal more than a license, in that it gives an irrevocable interest in the land and creates, by apt words, an estate, is expressed to be upon a consideration, and is sealed by the seal of the grantor. I can find no authority in any of the treatises or in any of the adjudged cases for holding that it is revocable.

As in my judgment the right of the complainant is entirely clear and not subject to revocation, I think it is entitled to relief by way of immediate injunction. * * *

SECTION 2.—CREATION OF EASEMENTS

Easements may be created by express grant, by implied grant, and by prescription. If by express grant, the conveyance must be in writing under the statute of frauds, since an easement is an interest in land.

Easements by implied grant are created in connection with conveyances of land although the grant of the additional right to the easement is not mentioned in the deed. The circumstances indicate that such additional interest was intended to be conveyed.

An easement by prescription is created by operation of law, and the foundation for the right is adverse user of the land of another for the prescriptive period.

1. BY EXPRESS GRANT

Any easement may be created by express grant. Such easement may be created by a reservation in the conveyance of the servient estate in favor of the grantor, the reservation operating as a grant of the easement. Thus an easement of way, for example, in favor of land A may be secured over land B, either (1) by written deed from the owner of B; or (2) where the owner of A also owns B and conveys B but reserves a way appurtenant to A. So, also, the individual owners of two adjoining buildings having a common skylight may by mutual covenants each secure an easement of light and air in so much of such skylight as is situated upon the lot of the other.

Since an easement is an interest in land, if created by an oral contract it is void under the statute of frauds. Therefore it is essential that the grant be in writing. In general, it may be said that the grant of an easement must contain all the formal requisites of a grant of land.

2. BY IMPLIED GRANT

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THOMAS v. McCOY et al.

Appellate Court of Indiana, 1911. 48 Ind.App. 403, 96 N.E. 14.

[This is a prayer for a decree to confirm a way of necessity across defendant's land. The bill shows that plaintiff is the owner of a piece of land which is entirely surrounded by the land of other persons, that it is one quarter of a mile from any public highway, without a road or way leading to such highway, that the most direct outlet for plaintiff's land to a public highway is east across the adjoining land of defendant abutting on a highway, and that plaintiff in writing requested defendant to mark out a way over his land for plaintiff's use, which was refused, and that later plaintiff located, marked out, and described a way one rod wide along the south side of defendant's land, and notified defendant of his action in that regard; that defendant refused and still refuses to permit plaintiff to pass over his land to and from plaintiff's own land to said highway.

[As basis for plaintiff's claim to an easement of way over the land of defendant, plaintiff shows that on September 14, 1883, one Leander Small was the owner both of the tract of land now owned by plaintiff and that owned by defendant; that on the said day Small conveyed to plaintiff the parcel now owned by him, retaining the tract which he later conveyed to the defendant.]

MYERS, J. * * * The facts exhibited by the complaint * * * show that appellant's deed from Small and McIntyre by operation of law carried with it an implied grant of a way as of necessity to a public highway over the land retained by them. * * * As was said in the case of *Logan v. Stogsdale* (1890) 123 Ind. 372, 24 N.E. 135, 8 L.R.A. 58: "The theory is that, where land is sold that has no outlet, the vendor grants one over the parcel of which he retains the ownership."

[Defendant occupies the position of Small, plaintiff's grantor, and as the law implied a grant at the time Small conveyed to plaintiff, and as that grant was prior to Small's grant to defendant, said defendant must carry into effect his predecessor's implied grant. It follows that since plaintiff is the holder of an im-

plied easement of way of necessity over defendant's land, he should be confirmed in said way by decree.

[Judgment for plaintiff.]

3. CREATION OF EASEMENT BY PRESCRIPTION

In General.—So far we have considered two methods by which easements, or rights in another's land, may be acquired or created, namely, by express grant, and by a grant implied in fact from the conduct of the parties. As a third method, easements may be acquired by a grant implied in law, which is called "prescription."

Definition.—Prescription consists of an adverse user of the property of another for a certain period of time, usually the same as that required to give title to land itself by adverse possession. The reason the law implies a grant from such adverse user is that public policy requires certitude in land titles. The theories upon which the doctrine of prescription is based are (1) the analogy of the statute of limitations as applicable to ownership of land; and (2) the presumption of a lost grant raised by the adverse use.

Requisites.—In order to acquire an easement by prescription the claimant must prove that during the full time of the prescriptive period, ordinarily twenty years, he has exercised an adverse, open, visible, and uninterrupted use in another's land. From such uninterrupted use the law will imply an actual right. But in order that such right of using another's land be acquired, the user must have been such as to give rise to a right of action on the part of the owner, since, if he cannot legally protect himself against the user, no inference can be drawn from his failure to do so.

• PARKS v. BISHOP.

Supreme Judicial Court of Massachusetts, 1876.
120 Mass. 340, 21 Am.Rep. 519.

[This was a bill for injunction to restrain defendant from passing over land belonging to plaintiff. The defendant alleged in his answer that he had acquired a right of way over said land by adverse use.]

GRAY, C. J. * * * When a right of way to certain land exists by adverse use and enjoyment only, although evidence of the exercise of the right for a single purpose will not prove a right of way for other purposes, yet proof that it was used for a variety of purposes, covering every purpose required by the dominant estate, in its then condition, is evidence from which may be inferred a right to use the way for all purposes which may be reasonably required for the use of that estate while substantially in the same condition. *Ballard v. Dyson*, 1 *Taunt.* 279; *Cowling v. Higginson*, 4 *M. & W.* 245; *Dare v. Heathcote*, 25 *L.J.N.S.*, Exch. 245; *Williams v. James*, L.R. 2 *C.P.* 577; *Sloan v. Holliday*, 30 *L.T.N.S.*, 757. But if the condition and character of the dominant estate are substantially altered—as in the case of a way to carry off wood from wild land, which is afterwards cultivated and built upon; or of a way for agricultural purposes, to a farm, which is afterwards turned into a manufactory or divided into building lots—the right of way cannot be used for new purposes, required by the altered condition of the property, and imposing a greater burden upon the servient estate. *Atwater v. Bodfish*, 11 *Gray, Mass.*, 150; *Willes, J.*, in L.R. 2 *C.P.* 582; *Wimbledon Commons v. Dixon*, 1 *Ch.D.* 362.

In the present case, the report states that for more than twenty years Lakin had, in the shop abutting upon the passageway in question, a steam engine, which was driven by boilers in the larger building on the lot behind, and was used for operating the machinery in that building, the three stories of which were respectively occupied for a blacksmith's shop, a carriage shop, and a paint shop; that there was a door in the wall between the two buildings, which was constantly used for the purpose of passing between them through the engine room and over the passageway; that the space in the passageway was occasionally used for the purpose of setting tires upon wheels, in connection with the work in the shop; that all the coal for use under the boilers was brought in through the passageway, and deposited in the basement or cellar under the engineroom, until used in the regular course of business; and that the way was used generally as a back entrance or thoroughfare, as convenience required, in connection with the shops occupied by Lakin, without question or objection, for more than twenty years.

These facts appear to the court to justify and require the conclusion that Lakin had acquired by prescription a right of way for all purposes reasonably necessary for a manufactory upon the two lots, and which, upon the buildings being destroyed by fire and rebuilt for a manufactory and storehouse, he was entitled to use for the purpose of bringing goods into the smaller building abutting upon the passageway, to be thence hoisted up into the larger building, for storage and use therein; and that there has been no substantial alteration in the condition or character of the dominant estate, and no change, except in degree, in the exercise of the easement, and that for this reason the defendant has not exceeded his rights in the use of the passageway.

Bill dismissed.

SECTION 3.—EASEMENTS IN STRUCTURES

1. PARTY WALLS

Party walls, if built on the boundary lines between two differently owned properties, require mutual easements of support, as each half occupies a part of the land of the other owner. Once erected each parcel of land is subject to an easement in favor of the other parcel. Such easements must be created by grant, express or implied, or by prescription.

A party wall standing on a boundary line must necessarily extend over and onto the land on both sides. Each owner owns the part of the wall on his land, but each owner's parcel of land is subject to an easement of support in favor of the other owner's land as regards the wall. Such easements may be created in the following ways: (1) Where two adjoining owners mutually agree to the building of a party wall between their properties, each parcel of land is subject to the other's easement. (2) Where a single owner owns two parcels of land on the boundary of which there is a wall, and he sells one parcel, the mutual easements are created by implied grant. (3) Where without agreement or grant a wall is built and continues in existence for 20 years under a claim of right, an easement by prescription arises.

2. SUPPORT OF BUILDINGS

The right in another's land of lateral support relates only to land unburdened with a building. The right to additional support sufficient to maintain the superadded weight of a building is an easement, which, to be held, must be acquired.

Acquisition of Easement of Support.—An easement of support for a building can only be acquired by an express or implied grant. It cannot be acquired by prescription. Where two adjacent lots, requiring mutual support and burdened with buildings, are conveyed to different owners, a right of support of land and building passes by the conveyance to each grantee, unless excluded by the terms of the grant. This implied grant of an easement of support is similar to an implied grant of a right of way, already considered.

Duty of Care Required in Excavating.—Where the owner of land has, in addition to the natural right of lateral support for his land, an easement of support in the adjacent lot for his land burdened with a building, the owner of the adjacent lot must, in excavating, provide an artificial support sufficient to maintain the building. On the other hand, where there is no such easement of support, such adjacent owner is not held to this absolute liability for damages. The law requires from him only the duty (1) to give notice to the owner of the building, in order that the latter may have an opportunity to protect his property; and (2) to use a reasonable degree of care and skill in making his excavation.

SECTION 4.—EASEMENTS OF WAY

1. PRIVATE RIGHTS OF WAY

A right of way is the privilege that one person has to pass over the lands of another. It may be acquired by grant or by prescription. Any interference with the right once it has been acquired, by the owner of the land, is an actionable wrong.

A right of way over private lands is acquired by prescription where a person, without the permission of the owner, uses the land adversely under a claim of right, openly, actually, continuously and uninterrupted for the prescriptive period. Usually the prescriptive period is the same as that required for title to realty by adverse possession, twenty years.

If the use is with the permission of the owner then no prescriptive right arises as the use is not adverse or under a claim of right.

The use must be open—that is, it must be visible and notorious. A secret use will not give rise to a prescriptive easement.

The use must also be actual. The line of the traveled road must be definite. If the person travels over the road in different directions no prescriptive right results, and a material deviation in the line previously traveled breaks the continuity of the prescriptive use.

While continuous use is essential for prescriptive right of way, it is not necessary that the land be used twenty-four hours a day. The continuity of use must only be a reasonable one under all the circumstances. Nonuse for days or weeks may still be considered as continuous, if the circumstances reasonably lead to such a conclusion.

If the use is interrupted before the full prescriptive period has run, then no prescriptive easement can arise. The owner of the land may interrupt the use by suing in trespass, or by forcibly evicting the trespasser, or by putting up a gate or sign over the right of way. Any one of these is sufficient to interrupt the user. As a general rule, mere notification by mail is not sufficient.

The authorities are in conflict as to whether knowledge by the owner of the land that someone is using it adversely is necessary before there can be a prescriptive right. The better rule seems to be that the owner need not have such knowledge.

The prescriptive easement is personal to the one who acquires it and cannot be assigned or transferred by him to others.

HOOSIER STONE CO. et al. v. MALOTT et al.

Supreme Court of Indiana, 1891. 130 Ind. 21, 29 N.E. 412.

[This was a bill for injunction to restrain the defendant, Hoosier Stone Company, from allowing others to use a private right of way across plaintiff's land.]

OLDS, J. The facts as found by the court in this cause are, in substance, as follows: On the 19th day of December, 1883, the appellees, Josie F. Malott and John E. Malott and the appellant William P. Malott were the owners of the S.E. $\frac{1}{4}$ of the S.E. $\frac{1}{4}$ of section 33, township 6 N., range 1 W., in Lawrence county, Ind.; also other lands intervening between said tract in section 34, same township and range, and the Louisville, New Albany & Chicago Railroad, which ran through said section 34. On said day they sold and conveyed to the appellant the Hoosier Stone Company, in consideration of \$3,000, by warranty deed, said first-described 40-acre tract of land, together with a right of way for a railway switch track from the line of said railroad over the said lands of the appellees and said William E. Malott, in said section 34, to said 40-acre tract conveyed as aforesaid, and pursuant thereto put said Hoosier Stone Company in possession thereof. The Hoosier Stone Company constructed a railroad south from said railroad to said 40-acre tract so conveyed to it, which it has since used in conveying its stone quarried on said 40-acre tract to said railroad, and over which said switch said railroad company has conveyed its cars in transporting said stone so quarried on said 40 acres, at the instance of said Hoosier Stone Company. On the 1st of February, 1889, the Hoosier Stone Company, without the knowledge or consent of appellees, and for a valuable consideration, subleased and conveyed to appellants Gilbert and Henry Perry, Frederick, William, and Sarah Mathews, and Philip N. Buskirk the right to pass over and use said switch and way and to transport their stone over the same, said parties being engaged in quarrying stone in considerable quantities on lands of their own adjacent to said 40-acre tract so sold to the Hoosier Stone Company, and the sublessees have ever since almost daily had their stone conveyed over said switch by means of locomotive and cars of the Louisville, New Albany & Chicago Railroad Company; and they claim the legal right, by reason of the

facts aforesaid, to continue so to do; and the Hoosier Stone Company claims the right to sublease said right of way, and deny the right of the railroad to run over said switch, except as licensed so to do by said Hoosier Stone Company. The appellees filed their complaint in this action, alleging the facts in detail, and describing the land, asking that the lessees of the said company be perpetually enjoined from the further use of the switch and right of way, and for damages. The appellants demurred to the complaint. * * *

This presents the principal question in the case, as to what rights the stone company acquired by the conveyance of the way, and what it may be used for and by whom. The complaint sets out the conveyance, and the answer alleges the conveyance, and claims a right on the part of the company to use the way itself, and to authorize a general use of it by others to convey the products of their stone quarries upon other lands than the 40 acres so conveyed to the stone company. Private ways are either appendant or in gross. Ways appendant are incident to an estate; they ripen to the land, concern the premises, and pertain to its enjoyment, and pass with the land. * * * The conveyance in this case by warranty deed conveyed the 40 acres of land and with it designated also a right of way for a railway switch across other lands, to the Louisville, New Albany & Chicago Railroad. * * * It constituted a grant of the 40 acres and a way across the other land from such tract to the railroad. It was a grant of a way appendant, and is incident to the estate of the company in the 40 acres. It inheres in the land, and concerns the premises, and pertains to the enjoyment of the same. It is held that, where land is granted with a right of way, that right is appurtenant to every part of the land thereafter granted. Watson v. Bioren, 7 Am.Dec. 617. The way is granted for the benefit of the particular land, and its use is limited to use in connection with the enjoyment of such land. Such a way cannot be converted into a public way without the consent of the grantors, and the grantors have the right to rely on its use being limited to the purpose for which it is granted—or, in other words, its legal use—and can prevent the use of the way for purposes not authorized. If, as contended by the appellants, the Hoosier Stone Company has the right to sublease or to permit the use of it by its co-appellants for the transportation of the products of the stone-quarry situate upon

other lands, it may extend such use to others or permit its use for general public traffic. This would be entirely inconsistent with the rule of law governing the use of private ways. * * *

[Decree granting an injunction affirmed.]

2. RAILROAD RIGHTS OF WAY

Railroad rights of way are generally owned in fee simple by the companies, and so are greater than the right of an easement. However, a railroad may acquire an easement over the land of another by prescription, i. e. by adverse use.

3. STREET RAILWAY LINES

Street Railway Not an Additional Burden on Street.—Where abutting property owners have already granted a portion of their land for the creation of a street or way, the building of a street railroad upon such established streets, and the running of cars for the transportation of passengers do not constitute an additional burden on the land but are uses contemplated when the street was located. This is held, even where the fee or ownership of the land occupied by the street remains in the property owners, and the right of the public to use the street is in the nature of an easement. Therefore the consent of abutting property owners to the construction and operation of a street railroad is not essential unless required by the state Constitution or by state statutes.

Necessity of Legislative Consent.—Rights of control and use of streets are in the public. A city government holds such rights merely as trustee for the public benefit, and, unless clearly authorized by legislative enactment, it cannot surrender any portion of these rights to private persons or corporations. Thus a city usually has not the power to grant a franchise to a street railway, at least where the franchise is unlimited as to time and which does not reserve the power of revocation. Such a franchise differs from a mere license, which is revocable and subject to regulation and control of the city. Legislative enactment is essential to the grant of an irrevocable franchise.

4. TELEGRAPH AND TELEPHONE LINES

Authority for Installation on Streets.—Since the right of use and control of streets is in the public, it follows that legislative sanction is essential to authorize the use of streets for telegraph or telephone lines and poles. Such authorization may be given directly, or it may be given indirectly through the delegation of the legislative power to a city government. Generally a city or village has the power to grant to a telephone or telegraph company the right to construct a line upon its streets.

Necessity for Consent of Property Owners.—The placing of telegraph and telephone lines upon a street constitutes a new use of the street, and therefore this is an additional burden for which abutting property owners are entitled to compensation. Their consent, therefore, must be obtained, whether the consent be voluntary or involuntary by condemnation proceedings. However, in any case in which the absolute ownership in the street or highway is vested in the public, there can be no legal objection to a grant by the public of the right to erect such poles and lines, and the consent of abutting property owners is not necessary.

5. RIGHTS AS BETWEEN HOLDERS OF EASEMENTS OF WAY—INDUCED CURRENT INTERFERENCE

CUMBERLAND TELEPHONE & TELEGRAPH CO. v. UNITED ELECTRIC RY. CO. et al.

Circuit Court of the United States, M.D. Tennessee, 1890.
42 F. 273, 12 L.R.A. 544.

[This was a bill for injunction filed by the telephone company against the defendant street railway company to restrain the latter from operating its street cars by means of electrical current. The bill charged that the electricity generated by defendant, which is supposed to return to the dynamos by means of a return metallic circuit consisting of the steel rails upon which defendant's cars run] scatters through the earth, and is thereby conducted to the wires of the telephone company through various agencies,

known as "conduction" or leakage, and this current, being stronger, overcomes the weaker current of the telephone, producing loud, buzzing noises, and wholly preventing, or greatly interfering with, telephonic communication. Besides the electricity thus conducted acts upon the bells of subscribers when there is no call from the central office, causing them to ring, and also causing a great number of the annunciators at the exchange to fall at one time, so that the operators cannot tell who, if any one, has called. That, if the currents used by the cars were constant and uniform, it would not interfere with the telephones. It further averred that the service was interfered with by *induction*, where a varying current of electricity, conveyed on a conducting wire, will produce in a parallel wire other currents of electricity. The varying current upon the trolley line induces a like current in the parallel telephone wires on the same street, and also, as in the case of conduction, produces the noises and sounds, and rings the bells of subscribers, and throws down the annunciators. The bill also charged that the single trolley was dangerous to life and property. If, by winds and storms, a telephone wire should break, and fall across the trolley, it might be fatal to man or beast to touch it, and dangerous to the lives of those in the telephone exchanges, sometimes causing fire in the houses of subscribers. The bill concluded that all these troubles and dangers would be avoided if defendants would use an entire metallic circuit, or double trolley, properly constructed, and that the same result would follow if complainant would use a complete metallic circuit for every one of its subscribers; but the latter would nearly double the cost of the plant, and grave difficulties would be encountered at the central office, which it was not certain could be successfully overcome. On the contrary, the single trolley could be converted into a double trolley at a comparatively small expense. That, in consequence of these interferences, subscribers make constant complaints, many threaten to, and some actually do, refuse to pay for their telephones. * * *

BROWN, J. * * * Complainant, in operating its instruments, connects each telephone with the ground by what is termed a "ground wire," through which the return current of electricity is carried to the earth, and perhaps through the earth, acting as a conductor, back to the telephone exchange. Such return, in some form or other, is necessary to the production of a current

of electricity in every case. Defendants, upon the other hand, use a single overhead wire or trolley, suspended over the middle of the track, along which the electric current passes, descending by the trolley rod or mast through the cars to the motors underneath, and thence to the rails, which are connected together at their ends, and which operate to convey the return current back to the dynamos at the power-house. The evidence, however, establishes the fact that the current does not all return by the rails. Much of it escapes, becomes scattered through the earth, ascends through the ground wires to the telephones, and seriously impairs their operation, by causing a humming or buzzing noise, which drowns the voice of the speaker, and often causes the annunciators in the exchange to fall, and the bells to give false calls, so that it is impossible for the operators to tell which, if any, of its subscribers have called, and, in short, throws the whole system into confusion.

That these evils exist, to the serious detriment of the telephone service, is not denied; but it also appears from the evidence upon both sides that they are not absolutely insurmountable. Indeed, there are but few serious questions of fact in this case, and these turn upon the relative practicability and expense of the several methods of overcoming this difficulty. * * * Let us consider the respective methods now suggested:

1. The double trolley. There seems to be no doubt that if defendants adopt a second trolley wire, the return current might be carried back to the dynamos without coming in contact with the earth at all, and the difficulty be completely overcome. Upon the other hand, we are satisfied from the affidavits that this would not only entail a large expense upon the defendants, but that it disfigures the streets with a complicated net-work of wires, and, wherever there are curves, turnouts, or switches, renders the road very difficult of operation. * * *

2. There seems to be no doubt that the evil may also be remedied by a return wire attached to each telephone, by which the current is carried directly back to the exchange, instead of being dumped into the earth. This, however, is open to the same objection as the double trolley. It is not only very expensive, doubling the cost of the electric plant, but would double the number of wires carried through our streets, already far too numerous.

for comfort, beauty, or safety. * * * Upon the whole, we deem this to be impracticable.

3. A third device, known as the "McCluer System," remains to be considered. This contemplates the employment of a single return wire upon each route disturbed by the railway service, to which each telephone upon that route is connected and which operates to complete the metallic circuit. If we are to believe the affidavits of those who are familiar with this device, it affords a perfect remedy for all disturbances produced by leakage or conduction, though there are also slight disturbances produced by induction from parallel wires, from which no complete relief has been discovered by any kind of metallic circuit, unless supplemented by the use of non-inducting cables, and the transposition of wires. This evil, however, is remediable by increasing the distance between the parallel wires, and does not seem to be regarded as a serious matter. * * * We think we are justified in assuming that the adoption of this device by the complainant would obviate the disturbances now produced by leakage.

The case, then, practically resolves itself into the question, at whose expense shall this change be made? As the testimony tends to show that the introduction of the McCluer device into the telephone service of Nashville would not cost to exceed \$10 to each telephone, the question is not vital to the existence of either of these companies. At the same time, as it is one that confronts the telephone and electric railways in every city of the country where both are used, it becomes of great importance. Are the telephone companies, which have the prior right to use the streets, bound to conform their business to the demands of these new-comers, though by so doing they put themselves to large expense? Or are the railway companies bound, as a condition of occupying the same territory, to see to it that, in operating their roads, no incidental damage is done to their neighbors? If the existence of one was absolutely incompatible with the continued operation of the other, it might be incumbent upon us to make a choice between these two great benefactions, both of which will rank among the necessities of modern urban life. But, as we are bound to assume that they can be persuaded to live together in harmony, the case virtually resolves itself into a ques-

tion of liability for certain damages sustained by the complainant. * * *

The substance of all the cases we have met with in our examination of this question * * * is that, where a person is making lawful use of his own property, or of a public franchise, in such a manner as to occasion injury to another, the question of his liability will depend upon the fact whether he has made use of the means which, in the progress of science and improvement, have been shown by experience to be the best; but he is not bound to experiment with recent inventions, not generally known, or to adopt expensive devices, when it lies in the power of the person injured to make use himself of an effective and inexpensive method of prevention. Hoyt v. Jeffers, 30 Mich. 181. If, in the case under consideration, it were shown that the double trolley would obviate the injury to complainant without exposing defendants or the public to any great inconvenience or a large expense, we think it would be their duty to make use of it, and should have no doubt of our power to aid the complainant by an injunction; but, as the proofs show that a more effectual and less objectionable and expensive remedy is open to the complainant, we think the obligation is upon the telephone company to adopt it, and that defendants are not bound to indemnify it; in other words, that the damage incidentally done to the complainant is not such as is justly chargeable to the defendants. Unless we are to hold that the telephone company has a monopoly of the use of the earth, and of all the earth within the city of Nashville, for its feeble current, not only as against the defendants, but as against all forms of electrical energy which, in the progress of science and invention, may hereafter require its use, we do not see how this bill can be maintained. * * * The motion for an injunction must be denied.

SECTION 5.—EASEMENTS IN ARTIFICIAL WATERCOURSES

Easements may be acquired in artificial watercourses. If the natural course of a stream has been altered by a dam or other artificial means, and such alteration continues for the prescriptive period,

the riparian owners have an easement or right to have the stream continue to flow in its altered course.

STANISLAUS WATER CO. v. BACHMAN.

Supreme Court of California, 1908. 152 Cal. 716, 93 P. 858, 15 L.R.A.,N.S., 359.

[The Stanislaus & San Joaquin Water Company owned the right to take water from the Stanislaus river for irrigation purposes. The company agreed to furnish and sell to one Threlfall, "his heirs and assigns, during each and every year, for the term hereinafter mentioned, for the purpose of irrigating his tract of four hundred and sixty-one acres of land, a flow of water sufficient to irrigate said land, at the price of \$1.50 per acre per year." Later this company made an assignment of all of its assets to the Stanislaus Water Company, plaintiff in this case; also Phelan sold his land to Bachman. The new company furnished the water to Bachman, but demanded a higher price, and brought this action therefor.]

SHAW, J. * * * The rights of Bachman under the agreement are the same as those of Threlfall. * * * The water right, when acquired, became an easement appurtenant to the land * * * and passed with it, upon the * * * sale [to Bachman], in the same manner as any other appurtenance or fixture passes with the title and possession of land. * * * It was an incident of the land, and would pass as such by a conveyance of the land, without express mention and without any reference thereto. * * * We are unable to perceive any material difference in principle * * * between fixtures and improvements attached to or erected upon land and a water right attached to land as an appurtenance, such as that here involved, and we hold that it is governed by the same rules. * * *

We have assumed that the right conferred on Threlfall by the agreement with the canal company was real property. This is controverted by plaintiff, and its argument is, for the most part, founded on the assumption that it was either personality, or that the agreement constituted nothing more than a personal covenant of that company which does not bind the plaintiff, as its successor. We think neither of these propositions is correct. The

water in its natural situation upon the surface of the earth, whether as a flowing stream, as a lake or pond, or as percolations in the soil, is real property will not be disputed. That it may become personality by being severed from the land and confined in portable receptacles is also evident. * * * The earth is composed of land and water and the water is not different in this respect from other material substances composing a part of the earth. Trees when felled and cut into logs and lumber; coal, iron, gold, and silver when taken from the mine; rocks when quarried from their bed; oil when pumped from the depths; clay when burned into bricks or converted into cement, all are real property before the change, but upon severance forthwith become personality.

The business of collecting water in reservoirs, conducting it in pipes to houses of a city, and there selling and delivering it to the occupants of such houses, is a process of severing the water from its connection with the earth and changing it into personal property. The person * * * engaged therein is as much engaged in trade and commerce as is the miner, the oil producer, the brickmaker, or the cement manufacturer who sells his product. But the substances in which these persons deal do not become personality until the severance is complete. The right to the water in the pipes and the pipes themselves, usually constitute an appurtenance to real property in such cases, and, if so, the water usually retains its character as realty until severance is completed by its delivery from the pipes to the consumer. The right in water which has been diverted into ditches or other artificial conduits, for the purpose of conducting it to land for irrigation, has been uniformly classed as real property in this state. "The right to water must be treated in this state as it has always been treated, as a right running with the land and as a corporeal privilege bestowed upon the occupier or appropriator of the soil; and as such, has none of the characteristics of mere personality." * * *

[Therefore] the agreement is, in legal effect, an agreement to sell a right or interest in real property. Water, flowing in a canal or artificial conduit, and delivered therefrom upon land, for the irrigation of that land, does not change its character from realty to personality. It remains real property throughout the process, and until it serves its purpose by being absorbed into the land

which it moistens. Hence, the agreement to furnish the necessary water from the canal from year to year, during the times specified, and to deliver it upon the Threlfall lands for the irrigation thereof, for an agreed price, was in substance and effect an agreement for the sale of real property of the canal company. Such an agreement, with all its terms, is binding, not only upon the maker, but upon all persons who subsequently acquire the maker's title to the property agreed to be sold, with notice of the agreement. The plaintiff, as we have seen, bought with notice, and it is therefore as much bound to comply with this part of the agreement according to its terms as if it had executed the same. * * *

APPENDIX

FORMS OF BUILDING CONTRACTS

A construction contract falls naturally into two main subdivisions:

1. The contract proper, containing the agreement of the parties, and the general terms by which the obligation of each is conditioned; and
2. The plans and specifications, containing the detailed terms and provisions governing performance of the builder's obligation.

It is a customary and wise precaution to include a special clause in the contract proper, whereby the parties expressly agree that the plans and specifications are to be as fully a part of the contract as if thereto attached or therein repeated.

The modern practice among architects, at least in large projects, where subcontractors may be asked to bid, is formally to separate the contract into three main subdivisions, making the first page of the set of specifications consist of the general conditions, which thus become a part of the specifications, and so are agreed to by every one who offers to do work in accordance with the specifications. By this practice the contract is composed of the following parts:

1. The general conditions, attached to and forming part of the specifications;
2. The drawings and written specifications; and
3. The agreement between owner and contractor.

It is difficult to say which is the better practice; indeed, there is little to choose between, since practically the same result may be reached by either method. However, the latter practice is that adopted by the American Institute of Architects, as will be

noted from a study of the standard form of construction contract adopted by that body and reprinted herein.

Among the following forms are three forms for contract between the owner and builder, the first being the standard form adopted and copyrighted by the Institute of Architects and approved by the National Association of Builders' Exchanges, the Associated General Contractors of America, the Joint Conference on Construction Contracts, the National Association of Master Plumbers, the National Association of Sheet Metal Contractors, the National Electrical Contractors Association, and the Building Trades Employers' Association of the City of New York. Forms II and III are separate types, carefully drawn with the purpose of forestalling subsequent litigation by detailed expression of the intent of the parties. It will be of value to compare the three forms, with a view of discovering important clauses contained in one and omitted in another, and perhaps showing how each might be improved, either by changes in addition or omission, in light of the action of the courts on these matters.

FORM I

A

THE GENERAL CONDITIONS OF THE CONTRACT FOR THE CONSTRUCTION OF BUILDINGS

Standard Form of the American Institute of Architects. These general conditions have received the approval of the National Association of Builders' Exchanges, the Associated General Contractors of America, the Joint Conference on Construction Contracts, the National Association of Master Plumbers, the National Association of Sheet Metal Contractors of the United States, the National Electrical Contractors' Association of the United States, the National Association of Marble Dealers, the Building Granite Quarries Association, and the Building Trades Employers' Association of the City of New York. Fourth edition, copyright 1915, 1918, 1925, by the American Institute of Architects, The Octagon, Washington, D. C. Copyrighted also in Canada (reprinted with permission of the American Institute of Architects. This permis-

sion applies solely to the Institute Standard Forms and in no way refers to the work as a whole).

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Art. 1. Definitions.—(a) The contract documents consist of the agreement, the general conditions of the contract, the drawings and specifications, including all modifications thereof incorporated in the documents before their execution. These form the contract.

(b) The owner, the contractor and the architect are those mentioned as such in the agreement. They are treated throughout the contract documents as if each were of the singular number and masculine gender.

(c) The term "subcontractor," as employed herein, includes only those having a direct contract with the contractor and it includes one who furnishes material worked to a special design according to the plans or specifications of this work, but does not include one who merely furnishes material not so worked.

(d) Written notice shall be deemed to have been duly served if delivered in person to the individual or to a member of the firm or to an officer of the corporation for whom it is intended, or if delivered at or sent by registered mail to the last business address known to him who gives the notice.

(e) The term "work" of the contractor or subcontractor includes labor or materials or both.

(f) All time limits stated in the contract documents are of the essence of the contract.

(g) The law of the place of building shall govern the construction of this contract.

Art. 2. Execution, Correlation and Intent of Documents.—The contract documents shall be signed in duplicate by the owner and the contractor. In case the owner and the contractor fail to sign the general conditions, drawings or specifications, the architect shall identify them.

The contract documents are complementary, and what is called for by any one shall be as binding as if called for by all. The intention of the documents is to include all labor and materials, equipment and transportation necessary for the proper execution of the work. It is not intended, however, that materials or work not covered by or properly inferable from any heading, branch, class or trade of the specifications shall be supplied unless distinctly so noted on the drawings. Materials or work described

in words which so applied have a well known technical or trade meaning shall be held to refer to such recognized standards.

Art. 3. Detail Drawings and Instructions.—The architect shall furnish with reasonable promptness, additional instructions, by means of drawings or otherwise, necessary for the proper execution of the work. All such drawings and instructions shall be consistent with the contract documents, true developments thereof, and reasonably inferable therefrom. The work shall be executed in conformity therewith and the contractor shall do no work without proper drawings and instructions.

The contractor and the architect, if either so requests, shall jointly prepare a schedule, subject to change from time to time in accordance with the progress of the work, fixing the dates at which the various detail drawings will be required, and the architect shall furnish them in accordance with that schedule. Under like conditions, a schedule shall be prepared, fixing the dates for the submission of shop drawings, for the beginning of manufacture and installation of materials and for the completion of the various parts of the work.

Art. 4. Copies Furnished.—Unless otherwise provided in the contract documents the architect will furnish to the contractor, free of charge, all copies of drawings and specifications reasonably necessary for the execution of the work.

Art. 5. Shop Drawings.—The contractor shall submit with such promptness as to cause no delay in his own work or in that of any other contractor, two copies of all shop or setting drawings and schedules required for the work of the various trades, and the architect shall pass upon them with reasonable promptness. The contractor shall make any corrections required by the architect, file with him two corrected copies and furnish such other copies as may be needed. The architect's approval of such drawings or schedules shall not relieve the contractor from responsibility for deviations from drawings or specifications, unless he has in writing called the architect's attention to such deviations at the time of submission, nor shall it relieve him from responsibility for errors of any sort in shop drawings or schedules.

Art. 6. Drawings and Specifications on the Work.—The contractor shall keep one copy of all drawings and specifications

on the work, in good order, available to the architect and to his representatives.

Art. 7. Ownership of Drawings and Models.—All drawings, specifications and copies thereof furnished by the architect are his property. They are not to be used on other work and, with the exception of the signed contract set, are to be returned to him on request, at the completion of the work. All models are the property of the owner.

Art. 8. Samples.—The contractor shall furnish for approval all samples as directed. The work shall be in accordance with approved samples.

Art. 9. Materials, Appliances, Employés.—Unless otherwise stipulated, the contractor shall provide and pay for all materials, labor, water, tools, equipment, light, power, transportation and other facilities necessary for the execution and completion of the work.

Unless otherwise specified, all materials shall be new and both workmanship and materials shall be of good quality. The contractor shall, if required, furnish satisfactory evidence as to the kind and quality of materials.

The contractor shall at all times enforce strict discipline and good order among his employés, and shall not employ on the work any unfit person or any one not skilled in the work assigned to him.

Art. 10. Royalties and Patents.—The contractor shall pay all royalties and license fees. He shall defend all suits or claims for infringement of any patent rights and shall save the owner harmless from loss on account thereof, except that the owner shall be responsible for all such loss when a particular process or the product of a particular manufacturer or manufacturers is specified, but if the contractor has information that the process or article specified is an infringement of a patent he shall be responsible for such loss unless he promptly gives such information to the architect or owner.

Art. 11. Surveys, Permits and Regulations.—The owner shall furnish all surveys unless otherwise specified. Permits and licenses of a temporary nature necessary for the prosecution of

the work shall be secured and paid for by the contractor. Permits, licenses and easements for permanent structures or permanent changes in existing facilities shall be secured and paid for by the owner, unless otherwise specified.

The contractor shall give all notices and comply with all laws, ordinances, rules and regulations bearing on the conduct of the work as drawn and specified. If the contractor observes that the drawings and specifications are at variance therewith, he shall promptly notify the architect in writing, and any necessary changes shall be adjusted as provided in the contract for changes in the work. If the contractor performs any work knowing it to be contrary to such laws, ordinances, rules and regulations, and without such notice to the architect, he shall bear all costs arising therefrom.

Art. 12. Protection of Work and Property.—The contractor shall continuously maintain adequate protection of all his work from damage and shall protect the owner's property from injury or loss arising in connection with this contract. He shall make good any such damage, injury or loss, except such as may be directly due to errors in the contract documents or caused by agents or employés of the owner. He shall adequately protect adjacent property as provided by law and the contract documents. He shall provide and maintain all passageways, guard fences, lights and other facilities for protection required by public authority or local conditions.

In an emergency affecting the safety of life or of the work or of adjoining property, the contractor, without special instruction or authorization from the architect or owner, is hereby permitted to act, at his discretion, to prevent such threatened loss or injury, and he shall so act, without appeal, if so instructed or authorized. Any compensation, claimed by the contractor on account of emergency work, shall be determined by agreement or arbitration.

Art. 13. Inspection of Work.—The architect and his representatives shall at all times have access to the work wherever it is in preparation or progress and the contractor shall provide proper facilities for such access and for inspection.

If the specifications, the architect's instructions, laws, ordinances or any public authority require any work to be specially

tested or approved, the contractor shall give the architect timely notice of its readiness for inspection, and if the inspection is by another authority than the architect of the date fixed for such inspection. Inspections by the architect shall be promptly made, and where practicable at the source of supply. If any work should be covered up without approval or consent of the architect, it must, if required by the architect, be uncovered for examination at the contractor's expense.

Re-examination of questioned work may be ordered by the architect and if so ordered the work must be uncovered by the contractor. If such work be found in accordance with the contract documents the owner shall pay the cost of re-examination and replacement. If such work be found not in accordance with the contract documents the contractor shall pay such cost, unless he shall show that the defect in the work was caused by another contractor, and in that event the owner shall pay such cost.

Art. 14. Superintendence: Supervision.—The contractor shall keep on his work, during its progress, a competent superintendent and any necessary assistants, all satisfactory to the architect. The superintendent shall not be changed except with the consent of the architect, unless the superintendent proves to be unsatisfactory to the contractor and ceases to be in his employ. The superintendent shall represent the contractor in his absence and all directions given to him shall be as binding as if given to the contractor. Important directions shall be confirmed in writing to the contractor. Other directions shall be so confirmed on written request in each case.

The contractor shall give efficient supervision to the work using his best skill and attention. He shall carefully study and compare all drawings, specifications and other instructions and shall at once report to the architect any error, inconsistency or omission which he may discover, but he shall not be held responsible for their existence or discovery.

Art. 15. Changes in the Work.—The owner, without invalidating the contract, may order extra work or make changes by altering, adding to or deducting from the work, the contract sum being adjusted accordingly. All such work shall be executed under the conditions of the original contract except that any

claim for extension of time caused thereby shall be adjusted at the time of ordering such change.

In giving instructions, the architect shall have authority to make minor changes in the work, not involving extra cost, and not inconsistent with the purposes of the building, but otherwise, except in an emergency endangering life or property, no extra work or change shall be made unless in pursuance of a written order from the owner signed or countersigned by the architect, or a written order from the architect stating that the owner has authorized the extra work or change, and no claim for an addition to the contract sum shall be valid unless so ordered.

The value of any such extra work or change shall be determined in one or more of the following ways:

- (a) By estimate and acceptance in a lump sum.
- (b) By unit prices named in the contract or subsequently agreed upon.
- (c) By cost and percentage or by cost and a fixed fee.

If none of the above methods is agreed upon, the contractor, provided he receives an order as above, shall proceed with the work. In such case and also under case (c), he shall keep and present in such form as the architect may direct, a correct account of the net cost of labor and materials, together with vouchers. In any case, the architect shall certify to the amount, including reasonable allowance for overhead and profit, due to the contractor. Pending final determination of value, payments on account of changes shall be made on the architect's certificate.

Art. 16. Claims for Extra Cost.—If the contractor claims that any instructions by drawings or otherwise involve extra cost under this contract, he shall give the architect written notice thereof within a reasonable time after the receipt of such instructions, and in any event before proceeding to execute the work, except in emergency endangering life or property, and the procedure shall then be as provided for changes in the work. No such claim shall be valid unless so made.

Art. 17. Deductions for Uncorrected Work.—If the architect and owner deem it inexpedient to correct work injured or done not in accordance with the contract, an equitable deduction from the contract price shall be made therefor.

Art. 18. Delays and Extension of Time.—If the contractor be delayed at any time in the progress of the work by any act or neglect of the owner or the architect, or of any employé of either, or by any other contractor employed by the owner, or by changes ordered in the work, or by strikes, lockouts, fire, unusual delay in transportation, unavoidable casualties or any causes beyond the contractor's control, or by delay authorized by the architect pending arbitration, or by any cause which the architect shall decide to justify the delay, then the time of completion shall be extended for such reasonable time as the architect may decide.

No such extension shall be made for delay occurring more than seven days before claim therefor is made in writing to the architect. In the case of a continuing cause of delay, only one claim is necessary.

If no schedule or agreement stating the dates upon which drawings shall be furnished is made, then no claim for delay shall be allowed on account of failure to furnish drawings until two weeks after demand for such drawings and not then unless such claim be reasonable.

This article does not exclude the recovery of damages for delay by either party under other provisions in the contract documents.

Art. 19. Correction of Work Before Final Payment.—The contractor shall promptly remove from the premises all materials condemned by the architect as failing to conform to the contract, whether incorporated in the work or not, and the contractor shall promptly replace and re-execute his own work in accordance with the contract and without expense to the owner and shall bear the expense of making good all work of other contractors destroyed or damaged by such removal or replacement.

If the contractor does not remove such condemned work and materials within a reasonable time, fixed by written notice, the owner may remove them and may store the material at the expense of the contractor. If the contractor does not pay the expenses of such removal within ten days thereafter, the owner may, upon ten days' written notice, sell such materials at auction or at private sale and shall account for the net proceeds thereof, after deducting all the costs and expenses that should have been borne by the contractor.

Art. 20. Correction of Work After Final Payment.—Neither the final certificate nor payment nor any provision in the contract documents shall relieve the contractor of responsibility for faulty materials or workmanship and, unless otherwise specified, he shall remedy any defects due thereto and pay for any damage to other work resulting therefrom, which shall appear within a period of one year from the date of substantial completion. The owner shall give notice of observed defects with reasonable promptness. All questions arising under this article shall be decided by the architect subject to arbitration.

Art. 21. The Owner's Right to Do Work.—If the contractor should neglect to prosecute the work properly or fail to perform any provision of this contract, the owner, after three days' written notice to the contractor may, without prejudice to any other remedy he may have, make good such deficiencies and may deduct the cost thereof from the payment then or thereafter due the contractor; provided, however, that the architect shall approve both such action and the amount charged to the contractor.

Art. 22. Owner's Right to Terminate Contract.—If the contractor should be adjudged a bankrupt, or if he should make a general assignment for the benefit of his creditors, or if a receiver should be appointed on account of his insolvency, or if he should persistently or repeatedly refuse or should fail, except in cases for which extension of time is provided, to supply enough properly skilled workmen or proper materials, or if he should fail to make prompt payment to subcontractors or for material or labor, or persistently disregard laws, ordinances or the instructions of the architect, or otherwise be guilty of a substantial violation of any provision of the contract, then the owner, upon the certificate of the architect that sufficient cause exists to justify such action, may, without prejudice to any other right or remedy and after giving the contractor seven days' written notice, terminate the employment of the contractor and take possession of the premises and of all materials, tools and appliances thereon and finish the work by whatever method he may deem expedient. In such case the contractor shall not be entitled to receive any further payment until the work is finished. If the unpaid balance of the contract price shall exceed the expense of finishing the work including compensation for additional managerial and administra-

tive services, such excess shall be paid to the contractor. If such expense shall exceed such unpaid balance, the contractor shall pay the difference to the owner. The expense incurred by the owner as herein provided, and the damage incurred through the contractor's default, shall be certified by the architect.

Art. 23. Contractor's Right to Stop Work or Terminate Contract.—If the work should be stopped under an order of any court, or other public authority, for a period of three months, through no act or fault of the contractor or of any one employed by him, or if the architect should fail to issue any certificate for payment within seven days after it is due, or if the owner should fail to pay to the contractor within seven days of its maturity and presentation, any sum certified by the architect or awarded by arbitrators, then the contractor may, upon seven days' written notice to the owner and the architect, stop work or terminate this contract and recover from the owner payment for all work executed and any loss sustained upon any plant or materials and reasonable profit and damages.

Art. 24. Applications for Payments.—The contractor shall submit to the architect an application for each payment, and, if required, receipts or other vouchers, showing his payments for materials and labor, including payments to subcontractors as required by article 37.

If payments are made on valuation of work done, such application shall be submitted at least ten days before each payment falls due, and, if required, the contractor shall, before the first application, submit to the architect a schedule of values of the various parts of the work, including quantities, aggregating the total sum of the contract, divided so as to facilitate payments to subcontractors in accordance with article 37 (e), made out in such form as the architect and the contractor may agree upon, and, if required, supported by such evidence as to its correctness as the architect may direct. This schedule, when approved by the architect, shall be used as a basis for certificates of payment, unless it be found to be in error. In applying for payments, the contractor shall submit a statement based upon this schedule, and, if required, itemized in such form and supported by such evidence as the architect may direct, showing his right to the payment claimed.

If payments are made on account of materials delivered and suitably stored at the site but not incorporated in the work, they shall, if required by the architect, be conditional upon submission by the contractor of bills of sale or such other procedure as will establish the owner's title to such material or otherwise adequately protect the owner's interest.

Art. 25. Certificates of Payments.—If the contractor has made application as above, the architect shall, not later than the date when each payment falls due, issue to the contractor a certificate for such amount as he decides to be properly due.

No certificate issued nor payment made to the contractor, nor partial or entire use or occupancy of the work by the owner, shall be an acceptance of any work or materials not in accordance with this contract. The making and acceptance of the final payment shall constitute a waiver of all claims by the owner, other than those arising from unsettled liens, from faulty work appearing after final payment or from requirement of the specifications, and of all claims by the contractor, except those previously made and still unsettled.

Should the owner fail to pay the sum named in any certificate of the architect or in any award by arbitration, upon demand when due, the contractor shall receive, in addition to the sum named in the certificate, interest thereon at the legal rate in force at the place of building.

Art. 26. Payments Withheld.—The architect may withhold or, on account of subsequently discovered evidence, nullify the whole or a part of any certificate to such extent as may be necessary to protect the owner from loss on account of:

- (a) Defective work not remedied.
- (b) Claims filed or reasonable evidence indicating probable filing of claims.
- (c) Failure of the contractor to make payments properly to subcontractors or for material or labor.
- (d) A reasonable doubt that the contract can be completed for the balance then unpaid.
- (e) Damage to another contractor.

When the above grounds are removed payment shall be made for amounts withheld because of them.

Art. 27. Contractor's Liability Insurance.—The contractor shall maintain such insurance as will protect him from claims under workmen's compensation acts and from any other claims for damages for personal injury, including death, which may arise from operations under this contract, whether such operations be by himself or by any subcontractor or any one directly or indirectly employed by either of them. Certificates of such insurance shall be filed with the owner, if he so require, and shall be subject to his approval for adequacy of protection.

Art. 28. Owner's Liability Insurance.—The owner shall be responsible for and at his option may maintain such insurance as will protect him from his contingent liability for damages for personal injury, including death, which may arise from operations under this contract.

Art. 29. Fire Insurance.—The owner shall effect and maintain fire insurance upon the entire structure on which the work of this contract is to be done and upon all materials, in or adjacent thereto and intended for use thereon, to at least eighty per cent. of the insurable value thereof. The loss, if any, is to be made adjustable with and payable to the owner as trustee for whom it may concern.

All policies shall be open to inspection by the contractor. If the owner fails to show them on request, or if he fails to effect or maintain insurance as above, the contractor may insure his own interest and charge the cost thereof to the owner. If the contractor is damaged by failure of the owner to maintain such insurance, he may recover as stipulated in the contract for recovery of damages.

If required in writing by any party in interest, the owner as trustee shall, upon the occurrence of loss, give bond for the proper performance of his duties. He shall deposit any money received from insurance in an account separate from all his other funds and he shall distribute it in accordance with such agreement as the parties in interest may reach, or under an award of arbitrators appointed one by the owner, another by joint action of the other parties in interest, all other procedure being as provided elsewhere in the contract for arbitration. If after loss no special agreement is made, replacement of injured work shall be ordered and executed as provided for changes in the work.

The trustee shall have power to adjust and settle any loss with the insurers unless one of the contractors interested shall object in writing within three working days of the occurrence of loss, and thereupon arbitrators shall be chosen as above. The trustees shall in that case make settlement with the insurers in accordance with the directions of such arbitrators, who shall also, if distribution by arbitration is required, direct such distribution.

Art. 30. Guaranty Bonds.—The owner shall have the right, prior to the signing of the contract, to require the contractor to furnish bond covering the faithful performance of the contract and the payment of all obligations arising thereunder, in such form as the owner may prescribe and with such sureties as he may approve. If such bond is required by instructions given previous to the submission of bids, the premium shall be paid by the contractor; if subsequent thereto, it shall be paid by the owner.

Art. 31. Damages.—If either party to this contract should suffer damage in any manner because of any wrongful act or neglect of the other party or of anyone employed by him, then he shall be reimbursed by the other party for such damage.

Claims under this clause shall be made in writing to the party liable within a reasonable time of the first observance of such damage and not later than the time of final payment, except as expressly stipulated otherwise in the case of faulty work or materials, and shall be adjusted by agreement or arbitration.

Art. 32. Liens.—Neither the final payment nor any part of the retained percentage shall become due until the contractor, if required, shall deliver to the owner a complete release of all liens arising out of this contract, or receipts in full in lieu thereof and, if required in either case, an affidavit that so far as he has knowledge or information the releases and receipts include all the labor and material for which a lien could be filed; but the contractor may, if any subcontractor refuses to furnish a release or receipt in full, furnish a bond satisfactory to the owner, to indemnify him against any lien. If any lien remain unsatisfied after all payments are made, the contractor shall refund to the owner all moneys that the latter may be compelled to pay in discharging such a lien, including all costs and a reasonable attorney's fee.

Art. 33. Assignment.—Neither party to the contract shall assign the contract or sublet it as a whole without the written

consent of the other, nor shall the contractor assign any moneys due or to become due to him hereunder, without the previous written consent of the owner.

Art. 34. Mutual Responsibility of Contractors.—Should the contractor cause damage to any other contractor on the work the contractor agrees, upon due notice, to settle with such contractor by agreement or arbitration, if he will so settle. If such other contractor sues the owner on account of any damage alleged to have been so sustained, the owner shall notify the contractor, who shall defend such proceedings at the owner's expense and, if any judgment against the owner arise therefrom, the contractor shall pay or satisfy it and pay all costs incurred by the owner.

Art. 35. Separate Contracts.—The owner reserves the right to let other contracts in connection with this work. The contractor shall afford other contractors reasonable opportunity for the introduction and storage of their materials and the execution of their work, and shall properly connect and coordinate his work with theirs.

If any part of the contractor's work depends for proper execution or results upon the work of any other contractor, the contractor shall inspect and promptly report to the architect any defects in such work that render it unsuitable for such proper execution and results. His failure so to inspect and report shall constitute an acceptance of the other contractor's work as fit and proper for the reception of his work, except as to defects which may develop in the other contractor's work after the execution of his work.

To insure the proper execution of his subsequent work the contractor shall measure work already in place and shall at once report to the architect any discrepancy between the executed work and the drawings.

Art. 36. Subcontracts.—The contractor shall, as soon as practicable after the signature of the contract, notify the architect in writing of the names of subcontractors proposed for the principal parts of the work and for such others as the architect may direct and shall not employ any that the architect may within a reasonable time object to as incompetent or unfit.

If the contractor has submitted before signing the contract a list of subcontractors and the change of any name on such list

is required in writing by the owner after signature of agreement, the contract price shall be increased or diminished by the difference in cost occasioned by such change.

The architect shall, on request, furnish to any subcontractor, wherever practicable, evidence of the amounts certified on his account.

The contractor agrees that he is as fully responsible to the owner for the acts and omissions of his subcontractors and of persons either directly or indirectly employed by them, as he is for the acts and omissions of persons directly employed by him.

Nothing contained in the contract documents shall create any contractual relation between any subcontractor and the owner.

Art. 37. Relations of Contractor and Subcontractor.—The contractor agrees to bind every subcontractor and every subcontractor agrees to be bound by the terms of the agreement, the general conditions, the drawings and specifications as far as applicable to his work, including the following provisions of this article, unless specifically noted to the contrary in a subcontract approved in writing as adequate by the owner or architect.

This does not apply to minor subcontracts.

The subcontractor agrees—

(a) To be bound to the contractor by the terms of the agreement, general conditions, drawings and specifications, and to assume toward him all the obligations and responsibilities that he, by those documents, assumes toward the owner.

(b) To submit to the contractor applications for payment in such reasonable time as to enable the contractor to apply for payment under article 24 of the general conditions.

(c) To make all claims for extras, for extensions of time and for damages for delays or otherwise, to the contractor in the manner provided in the general conditions for like claims by the contractor upon the owner, except that the time for making claims for extra cost is one week.

The contractor agrees—

(d) To be bound to the subcontractor by all the obligations that the owner assumes to the contractor under the agreement, general conditions, drawings and specifications, and by all the

provisions thereof affording remedies and redress to the contractor from the owner.

(e) To pay the subcontractor, upon the issuance of certificates, if issued under the schedule of values described in article 24 of the general conditions, the amount allowed to the contractor on account of the subcontractor's work to the extent of the subcontractor's interest therein.

(f) To pay the subcontractor, upon the issuance of certificates, if issued otherwise than as in (e), so that at all times his total payments shall be as large in proportion to the value of the work done by him as the total amount certified to the contractor is to the value of the work done by him.

(g) To pay the subcontractor to such extent as may be provided by the contract documents or the subcontract, if either of these provides for earlier or larger payments than the above.

(h) To pay the subcontractor on demand for his work or materials as far as executed and fixed in place, less the retained percentage, at the time the certificate should issue, even though the architect fails to issue it for any cause not the fault of the subcontractor.

(j) To pay the subcontractor a just share of any fire insurance money received by him, the contractor, under article 29 of the general conditions.

(k) To make no demand for liquidated damages or penalty for delay in any sum in excess of such amount as may be specifically named in the subcontract.

(l) That no claim for services rendered or materials furnished by the contractor to the subcontractor shall be valid unless written notice thereof is given by the contractor to the subcontractor during the first ten days of the calendar month following that in which the claim originated.

(m) To give the subcontractor an opportunity to be present and to submit evidence in any arbitration involving his rights.

(n) To name as arbitrator under arbitration proceedings as provided in the general conditions the person nominated by the subcontractor, if the sole cause of dispute is the work, materials, rights or responsibilities of the subcontractor; or, if of the sub-

contractor and any other subcontractor jointly, to name as such arbitrator the person upon whom they agree.

The contractor and the subcontractor agree that—

(o) In the matter of arbitration, their rights and obligations and all procedure shall be analogous to those set forth in this contract.

Nothing in this article shall create any obligation on the part of the owner to pay to or to see to the payment of any sums to any subcontractor.

Art. 38. Architect's Status.—The architect shall have general supervision and direction of the work. He is the agent of the owner only to the extent provided in the contract documents and when in special instances he is authorized by the owner so to act, and in such instances he shall, upon request, show the contractor written authority. He has authority to stop the work whenever such stoppage may be necessary to insure the proper execution of the contract.

As the architect is, in the first instance, the interpreter of the conditions of the contract and the judge of its performance, he shall side neither with the owner nor with the contractor, but shall use his powers under the contract to enforce its faithful performance by both.

In case of the termination of the employment of the architect, the owner shall appoint a capable and reputable architect, whose status under the contract shall be that of the former architect.

Art. 39. Architect's Decisions.—The architect shall, within a reasonable time, make decisions on all claims of the owner or contractor and on all other matters relating to the execution and progress of the work or the interpretation of the contract documents.

The architect's decisions, in matters relating to artistic effect, shall be final, if within the terms of the contract documents.

Except as above or as otherwise expressly provided in the contract documents, all the architect's decisions are subject to arbitration.

Art. 40. Arbitration.—All questions subject to arbitration under this contract shall be submitted to arbitration at the choice of either party to the dispute.

The contractor shall not cause a delay of the work during any arbitration proceedings, except by agreement with the owner.

The demand for arbitration shall be filed in writing with the architect, in the case of an appeal from his decision, within ten days of its receipt and in any other case within a reasonable time after cause thereof and in no case later than the time of final payment, except as otherwise expressly stipulated in the contract. If the architect fails to make a decision within a reasonable time, an appeal to arbitration may be taken as if his decision had been rendered against the party appealing.

No one shall be nominated or act as an arbitrator who is in any way financially interested in this contract or in the business affairs of either the owner, contractor or architect.

Unless otherwise provided by controlling statutes, the parties may agree upon one arbitrator; otherwise there shall be three, one named in writing, by each party to this contract, to the other party and to the architect and the third chosen by these two arbitrators, or if they fail to select a third within fifteen days, then he shall be chosen by the presiding officer of the Bar Association nearest to the location of the work. Should the party demanding arbitration fail to name an arbitrator within ten days of his demand, his right to arbitration shall lapse. Should the other party fail to choose an arbitrator within said ten days, then such presiding officer shall appoint such arbitrator. Should either party refuse or neglect to supply the arbitrators with any papers or information demanded in writing, the arbitrators are empowered by both parties to proceed *ex parte*.

If there be one arbitrator his decision shall be binding; if three the decision of any two shall be binding. Such decision shall be a condition precedent to any right of legal action, and wherever permitted by law it may be filed in court to carry it into effect.

The arbitrators, if they deem that the case demands it, are authorized to award to the party whose contention is sustained such sums as they shall deem proper for the time, expense and trouble incident to the appeal and, if the appeal was taken without reasonable cause, damages for delay. The arbitrators shall fix their own compensation, unless otherwise provided by agreement, and shall assess the costs and charges of the arbitration upon either or both parties.

The award of the arbitrators shall be in writing and it shall not be open to objection on account of the form of the proceeding or the award, unless otherwise provided by the controlling statutes.

In the event of such statutes providing on any matter covered by this article otherwise than as hereinbefore specified, the method of procedure throughout and the legal effect of the award shall be wholly in accordance with the said statutes, it being intended hereby to lay down a principle of action to be followed, leaving its local application to be adapted to the legal requirements of the jurisdiction having authority over the arbitration.

Art. 41. Cash Allowances.—The contractor shall include in the contract sum all allowances named in the contract documents and shall cause the work so covered to be done by such contractors and for such sums as the architect may direct, the contract sum being adjusted in conformity therewith. The contractor declares that the contract sum includes such sums for expenses and profit on account of cash allowances as he deems proper. No demand for expenses or profit other than those included in the contract sum shall be allowed. The contractor shall not be required to employ for any such work persons against whom he has a reasonable objection.

Art. 42. Use of Premises.—The contractor shall confine his apparatus, the storage of materials and the operations of his workmen to limits indicated by law, ordinances, permits or directions of the architect and shall not unreasonably encumber the premises with his materials.

The contractor shall not load or permit any part of the structure to be loaded with a weight that will endanger its safety.

The contractor shall enforce the architect's instructions regarding signs, advertisements, fires and smoking.

Art. 43. Cutting, Patching and Digging.—The contractor shall do all cutting, fitting or patching of his work that may be required to make its several parts come together properly and fit it to receive or be received by work of other contractors shown upon, or reasonably implied by, the drawings and specifications

for the completed structure, and he shall make good after them as the architect may direct.

Any cost caused by defective or ill-timed work shall be borne by the party responsible therefor.

The contractor shall not endanger any work by cutting, digging or otherwise, and shall not cut or alter the work of any other contractor save with the consent of the architect.

Art. 44. Cleaning Up.—The contractor shall at all times keep the premises free from accumulations of waste material or rubbish caused by his employés or work, and at the completion of the work he shall remove all his rubbish from and about the building and all his tools, scaffolding and surplus materials and shall leave his work "broom clean" or its equivalent, unless more exactly specified. In case of dispute the owner may remove the rubbish and charge the cost to the several contractors as the architect shall determine to be just.

[*Here follow the plans and specifications.*]

B

THE STANDARD FORM OF AGREEMENT BETWEEN CONTRACTOR AND OWNER FOR CON- STRUCTION OF BUILDINGS

Issued by the American Institute of Architects for use when a stipulated sum forms the basis of payment. This form of agreement has received the approval of the National Association of Builders' Exchanges, the Associated General Contractors of America, the Joint Conference on Construction Contracts, the National Association of Master Plumbers, the National Association of Sheet Metal Contractors of the United States, the National Electrical Contractors' Association of the United States, the National Association of Marble Dealers, the Building Granite Quarries Association, and the Building Trades Employers' Association of the City of New York. Fourth edition, copyright 1915, 1918, 1925, by the American Institute of Architects, The Octagon, Washington, D. C. Copyrighted also in Canada. This form is to be used only with the standard general conditions of the con-

tract for construction of buildings. (Reprinted with permission of the American Institute of Architects. This permission applies solely to the Institute Standard Forms and in no way refers to the work as a whole).

This agreement made the _____ day of _____ in the year nineteen hundred and _____, by and between _____, hereinafter called the contractor, and _____, hereinafter called the owner, witnesseth, that the contractor and the owner for the considerations hereinafter named agree as follows:

Article 1. Scope of the Work.—The contractor shall furnish all of the materials and perform all of the work shown on the drawings and described in the specifications entitled [*here insert the caption descriptive of the work as used on the drawings and in the other contract documents*], prepared by _____, acting as and in these contract documents entitled the architect, and shall do everything required by this agreement, the general conditions of the contract, the specifications and the drawings.

Article 2. Time of Completion.—The work to be performed under this contract shall be commenced _____ and shall be substantially completed _____. [*Here insert stipulation as to liquidated damages, if any.*]

Article 3. The Contract Sum.—The owner shall pay the contractor for the performance of the contract, subject to additions and deductions provided therein, in current funds as follows: [*State here the lump sum amount, unit prices, or both, as desired in individual cases.*] Where the quantities originally contemplated are so changed that application of the agreed unit price to the quantity of work performed is shown to create a hardship to the owner or the contractor, there shall be an equitable adjustment of the contract to prevent such hardship.

Article 4. Progress Payments.—The owner shall make payments on account of the Contract as provided therein, as follows: On or about the _____ day of each month _____ per cent. of the value, based on the contract prices, of labor and materials incorporated in the work and of materials suitably stored at the site thereof up to the _____ day of that month, as estimated by the architect, less the aggregate of previous payments; and upon substantial completion of the entire work, a sum sufficient to

increase the total payments to —— per cent. of the contract price. [Insert here any provision made for limiting or reducing the amount retained after the work reaches a certain stage of completion.]

Article 5. Acceptance and Final Payment.—Final payment shall be due —— days after substantial completion of the work provided the work be then fully completed and the contract fully performed.

Upon receipt of written notice that the work is ready for final inspection and acceptance, the architect shall promptly make such inspection, and when he finds the work acceptable under the contract and the contract fully performed he shall promptly issue a final certificate, over his own signature, stating that the work provided for in this contract has been completed and is accepted by him under the terms and conditions thereof, and that the entire balance found to be due the contractor, and noted in said final certificate, is due and payable.

Before issuance of final certificate the contractor shall submit evidence satisfactory to the architect that all payrolls, material bills, and other indebtedness connected with the work have been paid.

If, after the work has been substantially completed, full completion thereof is materially delayed through no fault of the contractor, and the architect so certifies, the owner shall, upon certificate of the architect, and without terminating the contract, make payment of the balance due for that portion of the work fully completed and accepted. Such payment shall be made under the terms and conditions governing final payment, except that it shall not constitute a waiver of claims.

Article 6. The Contract Documents.—The general conditions of the contract, the specifications and the drawings, together with this agreement, form the contract, and they are as fully a part of the contract as if hereto attached or herein repeated. The following is an enumeration of the specifications and drawings:

FORM II

BUILDING CONTRACT

This agreement, made this _____ day of _____ in the year one thousand nine hundred and _____, by and between _____, party of the first part (hereinafter known as the contractor—), and _____, party of the second part (hereinafter known as the owner—), witnesseth: That said contractor—, in consideration of the agreements herein made by said owner—, agree— with the said owner— as follows:

Article I. The contractor— shall and will provide all the materials and perform all the work for the _____, as shown on the drawings and described in the specifications prepared by _____, architect—, which drawings and specifications are identified by the signatures of the parties hereto, and become hereby a part of this contract.

Art. II. It is understood and agreed by and between the parties hereto that the work included in this contract is to be done under the direction of the said architect—, and that _____ decision as to the true construction and meaning of the drawings and specifications shall be final. It is also understood and agreed by and between the parties hereto that such additional drawings and explanations as may be necessary to detail and illustrate the work to be done are to be furnished by said architect—, and they agree to conform to and abide by the same so far as they may be consistent with the purpose and intent of the original drawings and specifications referred to in article I.

It is further understood and agreed by the parties hereto that any and all drawings and specifications prepared for the purposes of this contract by the said architect— are and remain _____ property, and that all charges for the use of the same, and for the services of said architect—, are to be paid by the said owner—.

Art. III. No alterations shall be made in the work except upon written order of the architect—; the amount to be paid by the owner—, or allowed by the contractor— by virtue of such alterations to be stated in said order. Should the owner— and contractor— not agree as to amount to be paid or allowed, the

work shall go on under the order required above, and in case of failure to agree, the determination of said amount shall be referred to arbitration, as provided for in article XII of this contract.

Art. IV. The contractor— shall provide sufficient, safe and proper facilities at all times for the inspection of the work by the architect— or his authorized representatives; shall, within twenty-four hours after receiving written notice from the architect— to that effect, proceed to remove from the grounds or buildings all materials condemned by him, whether worked or unworked, and to take down all portions of the work which the architect— shall by like written notice condemn as unsound or improper, or as in any way failing to conform to the drawings and specifications, and shall make good all work damaged or destroyed thereby.

Art. V. Should the contractor— at any time refuse or neglect to supply a sufficiency of properly skilled workmen, or of materials of the proper quality, or fail in any respect to prosecute the work with promptness and diligence, or fail in the performance of any of the agreements herein contained, such refusal, neglect or failure being certified by the architect—, the owner— shall be at liberty, after three days written notice to the contractor—, to provide any such labor or materials, and to deduct the cost thereof from any money then due or thereafter to become due to the contractor— under this contract; and if the architect— shall certify that such refusal, neglect or failure is sufficient ground for such action, the owner— shall also be at liberty to terminate the employment of the contractor— for the said work and to enter upon the premises and take possession, for the purpose of completing the work included under this contract, of all materials, tools and appliances thereon, and to employ any other person or persons to finish the work, and to provide the materials therefor; and in case of such discontinuance of the employment of the contractor— —— shall not be entitled to receive any further payment under this contract until the said work shall be wholly finished, at which time, if the unpaid balance of the amount to be paid under this contract shall exceed the expense incurred by the owner— in finishing the work, such excess shall be paid by the owner— to the contractor—; but if such expense shall exceed such unpaid balance, the contractor— shall pay the difference to

the owner—. The expense incurred by the owner— as herein provided, either for furnishing materials or for finishing the work, and any damage incurred through such default, shall be audited and certified by the architect—, whose certificate thereof shall be conclusive upon the parties.

Art. VI. The contractor— shall complete the several portions, and the whole of the work comprehended in this agreement by and at the time or times hereinafter stated, to wit:—

Art. VII. Should the contractor— be delayed in the prosecution or completion of the work by the act, neglect or default of the owner—, of the architect—, or of any other contractor employed by the owner— upon the work, or by any damage caused by fire or other casualty for which the contractor— — not responsible, or by combined action of workmen in no wise caused by or resulting from default or collusion on the part of the contractor—, then the time herein fixed for the completion of the work shall be extended for a period equivalent to the time lost by reason of any or all the causes aforesaid, which extended period shall be determined and fixed by the architect—; but no such allowance shall be made unless a claim therefor is presented in writing to the architect— within forty-eight hours of the occurrence of such delay.

Art. VIII. The owner— agree— to provide all labor and materials essential to the conduct of this work not included in this contract in such manner as not to delay its progress, and in the event of failure so to do, thereby causing loss to the contractor—, agree— that —— will reimburse the contractor— for such loss; and the contractor— agree— that if —— shall delay the progress of the work so as to cause loss for which the owner— shall become liable, then —— shall reimburse the owner— for such loss. Should the owner— and contractor— fail to agree as to the amount of loss comprehended in this article, the determination of the amount shall be referred to arbitration as provided in article XII of this contract.

Art. IX. It is hereby mutually agreed between the parties hereto that the sum to be paid by the owner— to the contractor— for said work and materials shall be ——, subject to additions and deductions as hereinbefore provided, and that such

sum shall be paid by the owner— to the contractor—, in current funds, and only upon certificates of the architect—, as follows:

Payments: —.

The final payment shall be made within — days after the completion of the work included in this contract, and all payments shall be due when certificates for the same are issued.

If at any time there shall be evidence of any lien or claim for which, if established, the owner— of the said premises might become liable, and which is chargeable to the contractor—, the owner— shall have the right to retain out of any payment then due or thereafter to become due an amount sufficient to completely indemnify — against such lien or claim. Should there prove to be any such claim after all payments are made, the contractor— shall refund to the owner— all moneys that the latter may be compelled to pay in discharging any lien on said premises made obligatory in consequence of the contractor— default.

Art. X. It is further mutually agreed between the parties hereto that no certificate given or payment made under this contract, except the final certificate or final payment, shall be conclusive evidence of the performance of this contract, either wholly or in part, and that no payment shall be construed to be an acceptance of defective work or improper materials.

Art. XI. The owner— shall during the progress of the work maintain insurance on the same against loss or damage by fire, —, the policies to cover all work incorporated in the building, and all materials for the same in or about the premises, and to be made payable to the parties hereto, as their interest may appear.

Art. XII. In case the owner— and contractor— fail to agree in relation to matters of payment, allowance or loss referred to in articles III or VIII of this contract, or should either of them dissent from the decision of the architect— referred to in article VII of this contract, which dissent shall have been filed in writing with the architect— within ten days of the announcement of such decision, then the matter shall be referred to a board of arbitration to consist of one person selected by the owner—, and one person selected by the contractor—, these two to select a third. The decision of any two of this board shall be final and

binding on both parties hereto. Each party hereto shall pay one-half of the expense of such reference. The contractor— shall during the progress of the work maintain compensation insurance upon all employees.

The said parties for themselves, their heirs, successors, executors, administrators and assigns, do hereby agree to the full performance of the covenants herein contained.

In witness whereof, the parties to these presents have hereunto set their hands and seals, the day and year first above written.

_____, Witness.

_____, Contractor.

_____, Witness.

_____, Owner.

FORM III

This agreement, between _____, of _____, hereinafter called the owner, and _____, of _____, hereinafter called the contractor, made at _____ the _____ day of _____, 19____.

The respective parties hereto, each in consideration of the agreements of the other herein set forth, agree with each other as follows:

Contractor's Agreement.—The contractor agrees to build, erect, complete and finish on _____ land _____ according to the drawings and specifications made by _____, architect. Said plans and specifications, together with this contract, of which they are deemed to be a part, are to be construed together, so that any work shown on the plans, though not mentioned on the specifications, or vice versa, or any provision of the contract not repeated in the plans and specifications, or vice versa, is to be executed by the contractor as a part of this contract. Figured dimensions are to prevail over scale. All things which in the opinion of the architect may fairly be inferred from the plans and specifications are to be executed as part of this contract by the contractor. If complete drawings of detail have not yet been made, the same, when made and conforming to said plans and specifications, are to constitute part of this contract, the architect being the sole judge as to whether said detailed drawings conform to said plans and specifications. All the plans and drawings re-

ceived by the contractor at any time during the continuance of this contract are at its termination to be returned to the architect.

All material and work, where the quantity, dimensions, and quality are not shown on the plans or specified in the specifications, are to be furnished in sufficient quantity and of sufficient dimensions for the proper execution of the work as determined by the architect, and the quality and workmanship are to be the best throughout, and satisfactory to the architect.

The contractor is to take out at his own expense all necessary permits from the municipal or other public authorities, to give all the notices required by law or municipal ordinance, and to pay all fees and charges incident to the due and lawful prosecution of the work covered by this contract.

Wherever this contract involves excavation or mason work, the contractor is to execute the same without encroaching upon adjoining public or private property, and shall procure for the owner the certificate of some competent surveyor, to be selected by the owner, that there has been no such encroachment, in which case the contractor shall be relieved from all responsibility as to the correct location of the walls and foundations in this respect.

The contractor shall devote his time and personal superintendence to the execution of this contract, and shall employ a competent foreman or clerk of the work, who shall at all times be present while any work is being done under this contract, at the building.

The entire work and all its parts, including material, workmanship, and rate of progress, shall be satisfactory to the architect. All materials rejected by the architect, whether worked or unworked, and whether affixed to the building or not, shall be removed from the premises (and for that purpose taken down if already attached to the building) at the request of the architect; and all work condemned by the architect, as in any way unsound or as not conforming to the terms of this contract, shall be taken down forthwith and rebuilt by the contractor in accordance with the contract and in a manner satisfactory to the architect. The contractor shall dismiss any of his employees if the architect con-

siders said employee incompetent or careless and so informs the contractor.

The contractor shall clear away all dirt and rubbish caused by his operations as often as requested by the architect or owner, and shall leave the premises at the termination of this contract free from such dirt and rubbish and in a neat and clean condition.

The contractor shall prosecute the work speedily and continuously _____ and the entire work covered by this contract shall be finished by the _____ day of _____, 19_____. The damages for default are fixed at _____ dollars for every day thereafter that the said work shall remain unfinished.

The contractor shall make good all defects, omissions, and violations of the terms of this contract whensoever discovered, during the progress of the work or afterwards, notwithstanding any payments that may have been made, or any certificates that may have been given, or any possession or acceptance of the work by the owner, and shall be responsible for any damages that may be caused in making good said defects, omissions, or violations.

The contractor shall comply with all the laws, ordinances, and regulations for the time being in force in the city or town where the building is situated and relating to the building or other work included in this contract, and shall satisfy all the requirements of the inspectors (if there be such).

The contractor shall furnish all transportation, scaffolding, apparatus, ways, works, machinery, and plant requisite for the execution of this contract, and shall be solely answerable for the safe, proper, and lawful construction, maintenance and use of the same; he shall cover and protect his work from damage, and all injury to the same, before the completion of this contract, shall be made good by him, and shall be solely answerable for all damage or delay to the owner or his property, to other contractors or employees of the owner, to neighboring premises, or to any person or property, due to the improper, illegal or negligent conduct of the contractor, or of his subcontractors, employees, or agents, in or about the said building or the execution of the work covered by this contract or any extra work undertaken as hereinafter provided.

The contractor shall have sole charge and possession of the work covered by this contract until the termination thereof, but shall permit the owner and the architect and any person employed by either of them to visit, enter, and inspect the said work at all times and places during the progress thereof, and shall provide safe and proper facilities for such inspection.

The contractor shall permit other contractors or employees of the owner to prosecute their work, and shall render them all necessary assistance.

The Owner's Agreement.—The owner agrees to pay the contractor the sum of ——— dollars according to the following schedules and subject to the conditions hereinafter set forth:

The first payment to be ——— dollars (\$———).

The second payment to be ——— dollars (\$———).

The third payment to be ——— dollars (\$———).

The fourth payment to be ——— dollars (\$———).

The fifth payment to be ——— dollars (\$———).

The sixth payment to be ——— dollars (\$———).

The seventh payment to be ——— dollars (\$———).

And the balance ——— dollars (\$———).
thirty-five days after the completion of this contract.

Total, \$———.

Provided, however, that none of the foregoing payments shall be due or payable, unless the following conditions shall have been complied with:

1. Unless the work to the stage in question has been done in the manner herein agreed, and there has been no breach by the contractor of any of the provisions of this contract.

2. Unless the contractor shall deliver to the owner the written certificate of the architect that the work to the stage in question has, in his opinion, been done in the manner herein agreed.

3. Unless (if the contract include excavations or mason work on outside walls) the contractor shall deliver to the owner the written certificate of some competent surveyor to be selected by the owner that there has been no encroachment upon adjoining public or private property.

4. Unless the property is free from all liens or right of lien for debts due or claimed to be due from the contractor, and satisfactory evidence thereof furnished (if requested) to the owner.

Alterations and Extras.—The architect may in writing and from time to time order the contractor to make any changes in the work which do not increase the cost to the owner or affect the time of completion. In case said changes make the work less expensive to the contractor, a proportional deduction shall be made from the contract price above specified. In no case shall any change be made in the work which shall increase the cost of the work to the owner, or involve any extension of time, without his express and special consent; and, if the contractor shall proceed to execute such change without first obtaining such consent, he shall be concluded against making any extra charge for the said change or any claim for further time.

In case of any change ordered by the architect as aforesaid, or in case any other changes in the work are made by the mutual consent of the parties hereto, whether affecting the contract price or not, or the time of completion or not, all and singular the other provisions of this contract shall remain in force and apply to the contract as thus altered.

Orders.—If any orders are accepted by the owner (and it is understood that he shall be under no obligation to accept any), such acceptances shall be conditional on the due performance by the contractor of all and singular the provisions of this contract, and subject to alterations as aforesaid.

The Architect.—The architect mentioned in this contract is understood to be _____, of _____, or such other architect as the owner may hereafter select; any change to be notified to the contractor in writing.

The architect shall have authority to enter and inspect the work at all times, to reject all material (whether set up or not) and to condemn all work which in his opinion is not in conformity with the provisions of this contract, and to do all the things hereinbefore set forth as within his powers. Neither the architect nor any person employed by him shall have any control or direction over the progress of the work, except the power of rejecting it, nor any control or superintendence over the scaffolding, apparatus, ways, works, machinery, or plant, the sole responsibility

for which shall rest with the contractor; and neither of them shall have power to order extras or alterations, except as above provided, or any authority other than that expressly set forth in this contract. The architect shall not be deemed the agent of the owner for any purpose whatsoever, except as the owner may in fact give him a special and express authority.

Miscellaneous Provisions.—No payment of money under this contract, nor any acceptance or possession taken of the work done by the contractor, nor any certificate given shall be evidence of the performance of this contract or be construed as a waiver of any of its provisions by the owner; nor shall any waiver of any breach of this contract be held to be a waiver of any other or subsequent breach.

If, in the opinion of the architect, the contractor is obstructed or delayed in the prosecution or completion of the work by the neglect, delay, or default of any other contractor or by any damage which may happen thereto by fire or by the unusual action of the elements or by the abandonment of the work by the employees in a general strike, then the contractor shall be entitled to such extension of the time specified above for the completion of the work as the architect shall in writing certify: Provided, however, that claim is made by the contractor at the time and in writing.

If at any time before the completion of this contract the contractor becomes bankrupt or insolvent, or makes an assignment for the benefit of creditors, or assigns this contract or sublets any part of it without the consent of the owner first obtained in writing, or becomes incapable of completing the contract, or shall at any time for six days refuse or neglect to proceed with the contract work in the manner herein agreed to the satisfaction of the architect, then the owner may at once terminate this contract by a written notice delivered to the contractor in person or at his usual place of business, and proceed to complete the work with other mechanics or contractors, and account to the contractor or his legal representatives as follows: The owner shall be credited with all payments theretofore made by him to the contractor, with the entire cost of completing the work with said other mechanics and contractors, and with all damages by delay or otherwise caused by the default of the contractor, including reasonable expenses of counsel. If the contract price exceeds the

total amount of these credits, the excess shall be paid to the contractor or his legal representatives. In case orders accepted by the owner are outstanding, the holders thereof shall be entitled to such excess in preference to the contractor or his legal representatives. If, however, the total amount of the said credits exceeds the contract price, the excess shall be due from the contractor to the owner. In such accounting, the owner shall not be held to obtain the lowest figures for the work of completing the contract; but all sums actually paid by him for such completion shall be credited to him.

All material delivered at the building by or on account of the contractor, and intended to be incorporated with the building, shall become the property of the owner as delivered; but the contractor may repossess himself of any surplus left at the completion of the contract. All scaffolding, apparatus, ways, works, machinery, and plant brought upon the premises by the contractor, or used by him, shall remain his property; but, in case of default and a completion of the contract work by the owner, the latter shall be entitled to use the said scaffolding, apparatus, ways, works, machinery, and plant without cost or liability for depreciation or injury by use.

If the owner does not make the payments herein provided as and when the same shall become due and payable, he shall be liable to the contractor for interest on the same; and if such default continues for a period of ten days, the contractor may, by a written notice delivered to the owner in person or at his usual place of business, terminate this contract. But the acceptance of any money under this contract subsequent to such default shall operate as a waiver thereof and of the right to terminate this contract by reason thereof.

The owner shall keep the building and the material on the premises insured against fire in such companies as he shall select, for the benefit of himself or any mortgagee and of any and all contractors on the building who shall request such insurance in writing. The expense of said insurance shall be borne by the owner; but he shall not be responsible for carrying too little insurance, unless the contractor has requested him in writing to insure in a certain specified amount, and the owner has neglected to do so for an unreasonable length of time. In the event of a fire, the insurance money shall be divided between the owner and

any mortgagee and those contractors for whose benefit the insurance was taken out, as their interests may appear; and the parties hereto shall respectively proceed to the completion of this contract.

All disputes arising out of this contract or the performance or breach thereof shall be settled by mutual agreement or in a court of law or equity before a single justice, auditor, or special master, and no claim shall be made for a trial by jury on the whole case or special issues.

In witness whereof, we, the said _____ and the said _____, hereto set our hands and seals this _____ day of _____, 19____.

FORM IV

THE STANDARD FORM OF BOND

Issued by the American Institute of Architects. This form has been approved by the National Association of Builders' Exchanges, the National Association of Master Plumbers, the National Association of Master Steam and Hot Water Fitters, the National Association of Sheet Metal Contractors of the United States, the National Electrical Contractors' Association of the United States, and the National Association of Marble Dealers. Second edition, copyright 1915 by the American Institute of Architects, The Octagon, Washington, D. C. (Reprinted with permission of the American Institute of Architects. This permission applies solely to the Institute Standard Forms, and in no way refers to the work as a whole).

Know all men: That we _____ [*here insert the name and address or legal title of the contractor*], hereinafter called the principal, and _____, _____, _____, and _____ [*here insert the name and address or legal title of one or more sureties*], herein-after called the surety or sureties are held and firmly bound unto _____ [*here insert the name and address or legal title of the owner*], hereinafter called the owner, in the sum of _____ (\$_____) for the payment whereof the principal and the surety or sureties bind themselves, their heirs, executors, administrators, successors and assigns, jointly and severally, firmly, by these presents.

Whereas, the principal has, by means of a written agreement, dated ——, entered into a contract with the owner for ——, a copy of which agreement is by reference made a part hereof:

Now, therefore, the condition of this obligation is such that if the principal shall faithfully perform the contract on his part, and satisfy all claims and demands, incurred for the same, and shall fully indemnify and save harmless the owner from all cost and damage which he may suffer by reason of failure so to do, and shall fully reimburse and repay the owner all outlay and expense which the owner may incur in making good any such default, and shall pay all persons who have contracts directly with the principal for labor or materials, then this obligation shall be null and void; otherwise it shall remain in full force and effect:

Provided, however, that no suit, action or proceeding by reason of any default whatever shall be brought on this bond after —— months from the day on which the final payment under the contract falls due:

And provided, that any alterations which may be made in the terms of the contract, or in the work to be done under it, or the giving by the owner of any extension of time for the performance of the contract, or any other forbearance on the part of either the owner or the principal to the other shall not in any way release the principal and the surety or sureties, or either or any of them, their heirs, executors, administrators, successors or assigns from their liability hereunder, notice to the surety or sureties of any such alteration, extension or forbearance being hereby waived.

Signed and sealed this —— day of ——, 19—. In presence of

_____ } as to _____ (Seal.)
_____ } as to _____ (Seal.)
_____ } as to _____ (Seal.)
_____ } as to _____ (Seal.)

FORM V**THE STANDARD FORM OF SUBCONTRACT**

This form has been approved by the National Association of Builders' Exchanges, the National Association of Master Plumbers, the National Association of Marble Dealers, and the National Association of Sheet Metal Contractors of the United States. Copyright 1915 by the American Institute of Architects, The Octagon, Washington, D. C. (Reprinted with permission of the American Institute of Architects. This permission applies solely to the Institute Standard Forms and in no way refers to the work as a whole).

This agreement, made this _____ day of _____, 19_____, by and between _____, hereinafter called the subcontractor, and _____, hereinafter called the contractor, witnesseth, that the subcontractor and contractor for the considerations hereinafter named agree as follows:

Section 1. The subcontractor agrees to furnish all material and perform all work as described in section 2 hereof for [*here name the kind of building*] for [*here insert the name of the owner*] hereinafter called the owner, at [*here insert the location of the work*] in accordance with the general conditions of the contract between the owner and the contractor, and in accordance with the drawings and the specifications prepared by _____, hereinafter called the architect, all of which general conditions, drawings and specifications signed by the parties thereto or identified by the architect, form a part of a contract between the contractor and the owner dated _____, 19_____, and hereby become a part of this contract.

Section 2. The subcontractor and the contractor agree that the materials to be furnished and work to be done by the subcontractor are: [*Here insert a precise description of the work, preferably by reference to the numbers of the drawings and the pages of the specifications.*]

Section 3. The subcontractor agrees to complete the several portions and the whole of the work herein sublet by the time or times following: [*Here insert the date or dates, and if there be liquidated damages state them.*]

Section 4. The contractor agrees to pay the subcontractor for the performance of his work the sum of _____ dollars (\$_____) in current funds, subject to additions and deductions for changes as may be agreed upon, and to make payments on account thereof in accordance with section 5 hereof.

Section 5. The contractor and subcontractor agree to be bound by the terms of the general conditions, drawings and specifications as far as applicable to this subcontract, and also by the following provisions:

The subcontractor agrees:

- (a) To be bound to the contractor by the terms of the general conditions, drawings and specifications, and to assume toward him all the obligations and responsibilities that he, by those documents, assumes toward the owner.
- (b) To submit to the contractor applications for payment in such reasonable time as to enable the contractor to apply for payment under his contract.
- (c) To make all claims for extras, for extensions of time and for damages for delays or otherwise, to the contractor in the manner provided in the general conditions for like claims by the contractor upon the owner, except that the time for making claims for extra cost is one week.

The contractor agrees.

- (d) To be bound to the subcontractor by all the obligations that the owner assumes to the contractor under the general conditions, drawings and specifications, and by all the provisions thereof affording remedies and redress to the contractor from the owner.
- (e) To pay the subcontractor, upon the issuance of certificates, if issued under a schedule of values, the amount allowed to the contractor on account of the subcontractor's work to the extent of the subcontractor's interest therein.
- (f) To pay the subcontractor, upon the issuance of certificates, if issued otherwise than as in (e), so that at all times his total payments shall be as large in proportion to the value of the work done by him as the total amount certified to the contractor is to the value of the work done by him.

(g) To pay the subcontractor to such extent as may be provided by the contract documents or the subcontract, if either of these provides for earlier or larger payments than the above.

(h) To pay the subcontractor on demand for his work or materials as far as executed and fixed in place, less the retained percentage, at the time the certificate should issue, even though the architect fails to issue it for any cause not the fault of the subcontractor.

(j) To pay the subcontractor a just share of any fire insurance money received by him, the contractor, under the general conditions.

(k) To make no demand for liquidated damages or penalty for delay in any sum in excess of such amount as may be specifically named in the subcontract.

(l) That no claim for services rendered or materials furnished by the contractor to the subcontractor shall be valid unless written notice thereof is given by the contractor to the subcontractor during the first ten days of the calendar month following that in which the claim originated.

(m) To give the subcontractor an opportunity to be present and to submit evidence in any arbitration involving his rights.

(n) To name as arbitrator under the general conditions, the person nominated by the subcontractor if the sole cause of dispute is the work, materials, rights or responsibilities of the subcontractor; or, if of the subcontractor and any other subcontractor jointly, to name as such arbitrator the person upon whom they agree.

The contractor and the subcontractor agree that:

(o) In the matter of arbitration, their rights and obligations and all procedure shall be analogous to those set forth in the general conditions.

Nothing herein shall create any obligation on the part of the owner to pay or to see to the payment of any sums to any subcontractor.

Section 6.

Finally. The subcontractor and contractor, for themselves, their heirs, successors, executors, administrators and assigns, do

hereby agree to the full performance of the covenants herein contained.

In witness whereof they have hereunto set their hands the day and date first above written.

_____, Subcontractor.
_____, Contractor.

In presence of

_____.

_____.

FORM VI

FORM OF INVITATION TO BID

Dear Sir: You are invited to submit a proposal for _____. Drawings, specifications, and other information may be procured from this office on and after _____. All documents must be returned to this office not later than _____.

To be entitled to consideration the proposal must be made upon the form provided by the architect, which must be fully completed in accordance with the accompanying "Instructions to Bidders" and must be delivered to this office not later than _____.

Very truly yours,

FORM VII

FORM OF INSTRUCTIONS TO BIDDERS

Proposals, to be entitled to consideration, must be made in accordance with the following instructions:

Proposals shall be made upon the form provided therefor, and all blank spaces in the form shall be fully filled; numbers shall be stated both in figures and in writing; the signature shall be in long hand; and the completed form shall be without interlineation, alteration or erasure.

Proposals shall not contain any recapitulation of the work to be done. No oral, telegraphic or telephonic proposals or modifications will be considered.

Proposals shall be addressed to the owner, in care of the architect, and shall be delivered to the architect inclosed in an opaque sealed envelope addressed to him, marked "Proposal" and bearing the title of the work and the name of the bidder.

Should a bidder find discrepancies in, or omissions from, the drawings or documents, or should he be in doubt as to their meaning, he should at once notify the architect, who will send a written instruction to all bidders. Neither owner nor architect will be responsible for any oral instructions.

Before submitting a proposal, bidders should carefully examine the drawings and specifications, visit the site or work, fully inform themselves as to all existing conditions and shall include in the proposal a sum to cover the cost of all items included in the contract.

The competency and responsibility of bidders and of their proposed subcontractors will be considered in making the award. The owner does not obligate himself to accept the lowest or any other bid.

Provision will be made in the agreement for payment on account in the following words: [Insert the provision.]

Any bulletins issued during the time of bidding are to be covered in the proposal and in closing a contract they will become a part thereof.

FORM VIII

FORM OF BID

[The proposal should be dated and addressed to the owner, in care of the architect.]

Dear Sir: Having carefully examined the instructions to bidders, the general conditions of the contract and specifications entitled [here insert the caption descriptive of the work as used therein] and the drawings, similarly entitled, numbered ——,

as well as the premises and the conditions affecting the work, the undersigned proposes to furnish all materials and labor called for by them for [here insert, in case all the work therein described is to be covered by one contract, "the entire work"; in case of a partial contract, insert name of the trade or trades to be covered and the numbers of the pages of the specifications on which the work is described] in accordance with the said documents, for the sum of _____ dollars (\$_____) and to execute a contract for the above work, for the above stated compensation in the form of the Standard Agreement of the American Institute of Architects (fourth edition), provided that he be notified of the acceptance of this proposal within _____ days of the time set for the submission of bids.

The undersigned further agrees, if awarded the contract, to complete it within _____ days, Sundays and holidays not included, and further agrees that, from the compensation otherwise to be paid, the owner may retain the sum of _____ dollars (\$_____) for each day thereafter that the work remains uncompleted, which sum is agreed upon as the proper measure of liquidated damages which the owner will sustain per diem by the failure of the undersigned to complete the work at the time stipulated, and this sum is not to be construed as in any sense a penalty.

[If a bond is required, insert the following:]

The undersigned agrees, if awarded the contract, to execute and deliver to the architect within _____ days after the signing of the contract, a good and satisfactory bond for the faithful performance of the contract and in the sum of _____, extending from the time of signature for _____ months from the day on which the final payment under the contract falls due, and further agrees that if such bond be not required, he will deduct from the proposed price the sum of _____ dollars (\$_____).

The undersigned further agrees that the certified check payable to _____, owner, accompanying this proposal, is left in escrow with the architect; that its amount is the measure of liquidated damages which the owner will sustain by the failure of the undersigned to execute the above-named agreement and bond, and that, if the undersigned defaults in executing that agreement within _____ days of written notification of the award of the

contract to him, or in furnishing the bond within _____ days thereafter, then the check shall become the property of the owner, but if this proposal is not accepted within _____ days of the time set for the submission of bids, or if the undersigned executes and delivers said contract and bond, the check shall be returned to him on his demand.

Alternative Proposals.—Should _____ be substituted for _____, the undersigned agrees to deduct (or will require the addition of) _____ dollars (\$_____) from (or to) the proposed sum.

If unit prices are required in proposal: The undersigned agrees that work added shall be computed at the following prices, and that work omitted shall be computed at _____ per cent. less than these prices: Concrete foundations, _____ per cubic yard. Rough brickwork, _____ per thousand. Plastering _____ per yard.

In case of obtaining the award the undersigned will employ, subject to the architect's approval, subcontractors in each of the several trades selected from the following list [*one or more names must be inserted for each trade*]:

Excavation, _____.

Stone masonry, _____.

Brickwork, _____.

etc., etc.

(Signed) _____, Bidder.

FORM IX

STANDARD FORM OF AGREEMENT BETWEEN OWNER AND ARCHITECT

Issued by the American Institute of Architects for use when a percentage of the cost of the work forms the basis of payment. Third edition—copyright 1917-1926 by the American Institute of Architects, Washington, D. C. (Reprinted with permission of the American Institute of Architects. This permission applies solely to the Institute Standard Forms and in no way refers to the work as a whole.)

This agreement, made the _____ day of _____ in the year nineteen hundred and _____ by and between _____, hereinafter called the owner, and _____, hereinafter called the architect, witnesseth, that whereas the owner intends to erect _____:

Now, therefore, the owner and the architect, for the considerations hereinafter named, agree as follows:

The architect agrees to perform, for the above-named work, professional services as hereinafter set forth.

The owner agrees to pay the architect for such services a fee of _____ per cent. of the cost of the work, with other payments and reimbursements as hereinafter provided, the said percentage being hereinafter referred to as the "basic rate."

The parties hereto further agree to the following conditions:

1. The Architect's Services.—The architect's professional services consist of the necessary conferences, the preparation of preliminary studies, working drawings, specifications, large scale and full size detail drawings; the drafting of forms of proposals and contracts; the issuance of certificates of payment; the keeping of accounts, the general administration of the business and supervision of the work.

2. Reimbursements.—The owner is to reimburse the architect the costs of transportation and living incurred by him and his assistants while traveling in discharge of duties connected with the work, and the costs of the services of heating, ventilating, mechanical and electrical engineers.

3. Separate Contracts.—The basic rate applies to work let under a single contract. For any portions of the work let under separate contracts, on account of extra service thereby required, the rate shall be four per cent. greater, and if substantially all the work is so let the higher rate shall apply to the entire work; but there shall be no such increase on any contracts in connection with which the owner reimburses the engineers' fees to the architect, or for articles not designed by the architect but purchased under his direction.

4. Extra Services and Special Cases.—If the architect is caused extra draughting or other expense due to changes ordered

by the owner, or due to the delinquency or insolvency of the owner or contractor, or as a result of damage by fire, he shall be equitably paid for such extra expense and the service involved.

Work let on any cost-plus basis shall be the subject of a special charge in accord with the special service required.

If any work designed or specified by the architect is abandoned or suspended the architect is to be paid for the service rendered on account of it.

5. Payments.—Payments to the architect on account of his fee shall be made as follows, subject to the provisions of article 4:

Upon completion of the preliminary studies, a sum equal to 20 per cent. of the basic rate computed upon a reasonable estimated cost.

Upon completion of specifications and general working drawings (exclusive of details), a sum sufficient to increase payments on the fee to 60 per cent. of the rate or rates of commission arising from this agreement, computed upon a reasonable cost estimated on such completed specifications and drawings, or if bids have been received, then computed upon the lowest bona fide bid or bids.

From time to time during the execution of work and in proportion to the amount of service rendered by the architect, payments shall be made until the aggregate of all payments made on account of the fee under this article, but not including any covered by the provisions of article 4, shall be a sum equal to the rate or rates of commission arising from this agreement, computed upon the final cost of the work.

Payments to the architect, other than those on his fee, fall due from time to time as his work is done or as costs are incurred.

No deductions shall be made from the architect's fee on account of penalty, liquidated damages, or other sums withheld from payments to contractors.

6. Survey, Borings and Tests.—The owner shall, so far as the work under this agreement may require, furnish the architect with the following information: A complete and accurate survey of the building site, giving the grades and lines of streets, pavements, and adjoining properties; the rights, restrictions, ease-

ments, boundaries, and contours of the building site, and full information as to sewer, water, gas and electrical service. The owner is to pay for borings or test pits and for chemical, mechanical, or other tests when required.

7. Supervision of the Work.—The architect will endeavor to guard the owner against defects and deficiencies in the work of contractors, but he does not guarantee the performance of their contracts. The supervision of an architect is to be distinguished from the continuous personal superintendence to be obtained by the employment of a clerk of the works.

When authorized by the owner, a clerk of the works acceptable to both owner and architect shall be engaged by the architect at a salary satisfactory to the owner and paid by the owner, upon presentation of the architect's monthly statements.

8. Preliminary Estimates.—When requested to do so the architect will furnish preliminary estimates on the cost of the work, but he does not guarantee the accuracy of such estimates.

9. Definition of the Cost of the Work.—The cost of the work as herein referred to, means the cost to the owner; but such cost shall not include any architect's or engineer's fees or reimbursements or the cost of a clerk of the works.

When labor or material is furnished by the owner below its market cost the cost of the work shall be computed upon such market cost.

10. Ownership of Documents.—Drawings and specifications as instruments of service are the property of the architect whether the work for which they are made be executed or not.

11. Successors and Assignments.—The owner and the architect each binds himself, his partners, successors, executors, administrators, and assigns to the other party to this agreement, and to the partners, successors, executors, administrators and assigns of such other party in respect of all covenants of this agreement.

Except as above, neither the owner nor the architect shall assign, sublet or transfer his interest in this agreement without the written consent of the other.

12. Arbitration.—All questions in dispute under this agreement shall be submitted to arbitration at the choice of either party.

The owner and the architect hereby agree to the full performance of the covenants contained herein.

In witness whereof they have executed this agreement, the day and year first above written.

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END OF VOLUME

